

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

FEDERAL TRADE COMMISSION,)
and)
COMMONWEALTH OF VIRGINIA) Docket No. 1:08-cv-460
ex. rel. ROBERT F.) Alexandria, Virginia
MCDONNELL, ATTORNEY)
GENERAL,)
) May 30, 2008
Plaintiffs,) 10:01 a.m.
)
v.)
)
INOVA HEALTH SYSTEM)
FOUNDATION,)
and)
PRINCE WILLIAM HEALTH)
SYSTEM,)
)
Defendants.)

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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18 Official Court Reporter
19 United States District Court
20 401 Courthouse Square, 8th Floor
21 Alexandria, Virginia 22314
22 Phone: (703)549-2080

23 Proceedings reported by machine shorthand, transcript produced
24 by computer-aided transcription.
25

1 P R O C E E D I N G S

2 THE CLERK: Civil Action 08-460, *Federal Trade*
3 *Commission, et al. v. Prince William Health System, et al.*

4 MR. GERSCH: Your Honor, David Gersch. I am lead
5 counsel for the defendants in this matter, Prince William
6 Hospital and Inova, and we're here on a motion for a scheduling
7 order.

8 Our position is set out in our papers. Very briefly,
9 the hospitals are entitled to close their merger absent the
10 entry of a preliminary injunction. The standard for that
11 injunction in the Fourth Circuit is that the government
12 establishes a probability of success on the merits and that the
13 equities are in favor of it. That's *FTC v. Atlantic Richfield*.

14 Every hospital case that the government has brought for
15 the last 15 years, they've lost. What we're here about is to
16 set a schedule which gives us the ability to test the
17 government's case. Now, the government says in their papers
18 they've got great facts. We say they're wrong, but that's not
19 what we're here about today. What we want is an ability to test
20 those facts.

21 So the parties have cooperated to a great extent. The
22 government said initially in their papers that you shouldn't set
23 a schedule today. I'm not sure they're adhering to that
24 position. We've sent in a revised scheduling order. There's a
25 tremendous amount of agreement on what we would like to do.

1 I think there are two major disputes, and those are
2 what I'd to address. The first, and importantly to us, is the
3 government resists identifying their witnesses. We propose that
4 they identify their witnesses on June 6th, and then what we want
5 to do is we want to be able to --

6 THE COURT: That's for a preliminary injunction?

7 MR. GERSCH: Yes. We want to be able to depose
8 whomever their witnesses are. Whether or not they're planning
9 to call them live or on paper, we feel we ought to be able to
10 depose whoever it is they're going to rely on, including their
11 experts.

12 They've told us they may have to up five experts. So
13 all we want is to have those people identified early on and have
14 us be able to depose all of them. If they told us, you know,
15 there's only one expert and there's only one fact witness, well,
16 then there will be less discovery. My sense of them from other
17 cases is they've got a lot of witnesses.

18 What we want is an opportunity for them to identify
19 those witnesses and for us to depose them. That's the first
20 matter. The second is we're asking Your Honor for a live
21 hearing, at least to the greatest extent that the Court can
22 accommodate us. Here's the reason for that.

23 As I think we point out in our papers, in every one of
24 these preliminary injunction cases, there have been live
25 witnesses. But it gets back to the government's point. They

1 say they've got facts. So if the government says, as they say
2 in their complaint, they say, for example, that the defendants
3 admit that the merger will cause prices to rise, we don't admit
4 that. Again, that should be tested in court. They should call
5 their witness, we should get a chance to cross-examine.

6 They say the merger is not going to improve quality.
7 We say they're wrong. They ought to call their witness --

8 THE COURT: Those are issues that will be decided when
9 the case is tried before the Commission.

10 MR. GERSCH: Yes.

11 THE COURT: You want me to try that first before the
12 Commission tries it.

13 MR. GERSCH: I want to address exactly that point, Your
14 Honor. They need to show you, to obtain the injunction, they
15 need to show the probability of success on the merits. That's
16 their burden. If they don't meet that burden, then there's no
17 injunction and the hospitals can close.

18 So all we're asking is whatever they want to show to
19 meet their burden, we're entitled to cross-examine that and we
20 ought to be entitled to put on our own evidence in response to
21 that.

22 As far as the administrative hearing, I would make two
23 points about that, Your Honor. First of all, legally it's
24 irrelevant. Under the statutory scheme, hospitals are entitled
25 to close unless they meet their burden of showing a preliminary

1 injunction. Again, they've failed in every hospital case so
2 far.

3 The second thing about the administrative hearing is,
4 and they're going to do their best to expedite the hearing,
5 they've made their representation, we were before the FTC
6 Commissioner who's going to conduct that hearing yesterday, but
7 it's still going to be a long time.

8 This is what they envision. They're asking for a trial
9 on October 6th, and the FTC Commissioner said that's when
10 they'll hold the trial. He wants a four-week trial with one
11 week off so now we're into November. He's got to write a
12 decision so we're talking about the end of the year. Then we're
13 going to the Commission on appeal, one side will appeal or the
14 other. The Commission is committed to get that done in 90 days.
15 I'm going to assume they'll meet that.

16 Okay. Now we're in March. The losing party's going to
17 go to the Fourth Circuit. Now we're a year -- at least a year
18 out. So the question is is let them bring their case, see if
19 they can meet their burden. We ought to be permitted to
20 examine, we ought to know who their witnesses are, we ought to
21 get a chance to depose them, and we would like for, to the
22 greatest extent possible, for that to be live.

23 The other reason we want it live, Your Honor, very
24 important issue in this case, is the Prince William Hospital
25 people, they ought to have an opportunity to come before Your

1 Honor and explain why this merger is good for their community,
2 why it is good for the quality of their hospital, why they need
3 the \$200 million they're going to get. I saw in counsels'
4 papers they said it's not really going to be \$200 million. If
5 they have a witness who's going to say that, we ought to be able
6 to cross-examine that witness.

7 Your Honor, with respect to the amount of evidence, to
8 a large degree that's going to depend on what the government
9 wants to put in, again, to meet its burden. If they want to put
10 in a lot of evidence, well, then that's their choice, but we
11 can't control that.

12 So all we're asking here is an opportunity for them to
13 designate their witnesses. We've got some witnesses we'll want
14 to put on, but we want a chance to depose them, including their
15 experts, and we would like an opportunity for the live
16 testimony, Your Honor.

17 THE COURT: All right.

18 MR. GERSCH: Thank you.

19 MR. EVERSON: Your Honor, I'm David Everson for the
20 Federal Trade Commission. I'm trusting that the Court wants me
21 to get to the point and not argue the merits of this case right
22 now. So while I disagree with our having lost the last case
23 that we brought on a hospital merger, although it was in the
24 Federal Trade Commission, we did win it, but we'll put that for
25 later.

1 Our position, Your Honor, is that consistent with the
2 case in the Fourth Circuit, the *Food Town* case, which is cited
3 in our brief, that the Court has said -- that the Fourth Circuit
4 has said that the only purpose of a proceeding under Section 13,
5 which is what brings us here today, is to preserve the status
6 quo until the FTC can perform its function. The Fourth Circuit
7 ruled. That's Judge Winter speaking for the Fourth Circuit, and
8 that's what we're asking for here.

9 Now, what we propose is that the Court take the case on
10 the papers. By the papers, we mean the briefing, we mean
11 declarations of witnesses which would be the same as direct
12 testimony. All of the fact witnesses will be deposed, and so by
13 deposition designation, the cross-examinations can be submitted
14 to the Court.

15 We have taken the position thus far that we would like
16 to have the experts in this proceeding testify by declaration
17 and not be cross-examined. The reason for that is because of
18 the schedule, and before the administrative proceeding, it's
19 going to involve cross-examination of them in August and we
20 would like to avoid it happening twice, but we're flexible on
21 that.

22 If the Court wants cross-examination of those experts,
23 we will gladly go along with that. Therefore, the experts, just
24 like the fact witnesses, can be cross-examined and that
25 cross-examination will be submitted to the Court by deposition

1 designation.

2 THE COURT: Are you already in discovery in front of
3 the Commission?

4 MR. EVERSON: We are starting next week, Your Honor.
5 We jumped the gun a little bit. The Commission said slow down
6 and start next week. So starting next week, we will be in
7 discovery. On Monday, for example, we'll be submitting an
8 initial list of witnesses.

9 So what we would like to do, Your Honor, if it pleases
10 the Court, would be to submit a packet to this Court. We'll be
11 judicious in what we would submit, how much testimony, but to
12 try to give the Court enough so that we can meet the standard of
13 the Fourth Circuit in the *Food Town* case.

14 We're going to have, as Mr. Gersch said, a full hearing
15 that begins on October the 6th. There will be full and open
16 discovery for that, Your Honor. We have agreed with the folks
17 from Inova that all of the discovery that is used and
18 produced -- or is done in the administrative matter can be used
19 in this Court and vice versa.

20 So we're being open, flexible, but consistent with what
21 the Fourth Circuit has said, we want to present something to
22 this Court that is concise and to the point.

23 Am I being responsive to what the Court wants to hear
24 today?

25 THE COURT: Yes indeed.

1 MR. EVERSON: All right, sir. I think I have responded
2 to what Mr. Gersch said.

3 Give me just a couple sentences, and I won't take but a
4 minute. The Congress has set up the Federal Trade Commission to
5 hear these matters. This is a very important case. While we
6 disagree with Mr. Gersch's comments about our success in
7 hospital cases, we are not unmindful of the position that they
8 have taken. This is a special case.

9 If you'll give me just a sentences on this. No one
10 that we've talked to at the Federal Trade Commission can
11 remember seeing a merger case with this great a concentration,
12 75 percent. When Inova takes over Prince William, while Prince
13 William has roughly 5 percent of the market, it will be
14 acquiring the remaining 20 percent of what's remaining in the
15 market.

16 I'm not going to argue that, but it's just so
17 important.

18 THE COURT: Your opponents may disagree with you.

19 MR. EVERSON: He will.

20 THE COURT: I'm not so sure getting into the facts is
21 going to be any help to me this morning.

22 MR. EVERSON: Yes, sir. Thank you.

23 MR. GERSCH: Your Honor, brief rebuttal?

24 THE COURT: Yes. About 30 seconds.

25 MR. GERSCH: Certainly, Your Honor.

1 I hear them say they don't really object to identifying
2 their witnesses and I hear them say that they don't object to us
3 deposing their experts, so we would like that opportunity. All
4 we ask is they do it by June 6th.

5 They say there'll be discovery in the administrative
6 proceeding. Obviously to the extent there's discovery there,
7 we'll use it here. We have a short enough time we don't want to
8 repeat anything.

9 Okay. So on that basis we would ask the Court to enter
10 the scheduling order that we've requested. That leaves the live
11 testimony portion. Again, I think you've gotten a flavor of
12 what the scope of disagreements are going to be. We think Your
13 Honor would benefit, and they've said it's a special case, we
14 think Your Honor would benefit, as all these other courts have
15 had, for an opportunity to hear those witnesses live or as many
16 of them as possible.

17 THE COURT: All right.

18 MR. GERSCH: Thank you, Your Honor.

19 MR. MENE: Yes, Your Honor, if I may. Gerard Mene,
20 U.S. Attorney's Office. Sorry to stop the flow here. One minor
21 housekeeping matter.

22 The Federal Trade Commission, under this statute, has
23 independent litigating authority. They've obtained local
24 counsel. So as a member of the bar of this Court, our office
25 was acting as local counsel, and we have a proposed order that

1 we would be withdrawing from the case, Your Honor.

2 THE COURT: All right.

3 MR. MENE: Thank you, Your Honor.

4 THE COURT: No objection to that?

5 MR. GERSCH: No objection, Your Honor.

6 THE COURT: All right. Well, I believe that the
7 defendant's motion here, while it's called a scheduling order
8 and expedited status conference, is an invitation for me to get
9 involved in trying this case. That is an invitation that I'm
10 going to decline.

11 This case needs to be tried before the Commission. The
12 issue before me is a very narrow one, as to whether or not a
13 preliminary injunction should be issued. That should come
14 before me in due course. You all can agree on a date and notice
15 it. I notice in your papers you've had some discussions
16 apparently about a date in July for a hearing, and you can
17 notice it for any Friday in July that you want to do that.

18 As far as live witnesses are concerned, I find that is
19 not necessary. You can present to me by declaration and
20 exhibits whatever evidence you want to present as far as that is
21 concerned.

22 You've already gotten discovery going so you'll even
23 have those witnesses too. You can present whatever testimony or
24 excerpts from those depositions that you're taking there, if you
25 so desire.

1 As far as the motion for a scheduling order, that will
2 be denied. I guess I've already given you the status
3 conference. We've had that this morning.

4 MR. GERSCH: Your Honor, may we have the right to
5 depose their experts?

6 THE COURT: That's up to whatever discovery you're
7 doing with the Commission.

8 MR. GERSCH: In the Commission, that's not going to
9 come till August. We're asking for the right to depose their
10 experts in this proceeding.

11 THE COURT: I'm not going to start discovery on a
12 preliminary injunction. No, that specific request would be
13 denied.

14 MR. GERSCH: Thank you, Your Honor.

15 THE COURT: Whatever you have going with the
16 Commission, if you want to present any of that evidence to me
17 and whatever discovery you're having with the Commission. He
18 says next week as I understood it.

19 MR. GERSCH: I just want to be clear. The expert
20 discovery will not be this next week. It is not scheduled until
21 August.

22 THE COURT: You know who your experts are and you can
23 submit whatever -- whatever they have to say, you can submit
24 whatever you want to.

25 MR. GERSCH: Thank you, Your Honor.

1 THE COURT: All right. Thank you.

2 * * *

3 (Proceedings concluded at 10:16 a.m.)

4

5 CERTIFICATION

6

7 I certify that the foregoing is a correct transcript
8 from the record of proceedings in the above-entitled matter.

9

10 Tracy Westfall, RPR, CMRS, CCR

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Date

Exhibit B

1 UNITED STATES OF AMERICA
2 FEDERAL TRADE COMMISSION
3 OFFICE OF ADMINISTRATIVE LAW JUDGES
4

5 In the Matter of:)
6 ILLUMINA, INC.,)
7 a corporation,)
8 and) Docket No. 9401
9 GRAIL, INC.,)
10 a corporation,)
11 Respondents.)
12 -----)

13
14 Virtual Proceeding Via Zoom
15 August 23, 2021
16 2:00 p.m.
17 FINAL PRETRIAL HEARING
18 PUBLIC RECORD
19

20 BEFORE THE HONORABLE D. MICHAEL CHAPPELL
21 Chief Administrative Law Judge
22
23
24

25 Reported by: Susanne Bergling, Court Reporter

Final Pretrial Hearing
Illumina. Inc. and Grail, Inc.

8/23/2021

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Final Pretrial Hearing
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8/23/2021

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Illumina. Inc. and Grail, Inc.

8/23/2021

1 INDEX OF RULINGS

2

3 Respondents' motion to modify the protective order:

4 Denied

5

6 Respondents' motion to exclude expert testimony of

7 Dr. Fiona Scott Morton: Denied

8

9 Respondents' motion in limine to exclude testimony of
10 rebuttal witness Dr. Amol Navathe: Denied

11

12 Respondent's Motion in limine to exclude testimony of
13 rebuttal expert witness Dr. Dov Rothman: Denied

14

15 Complaint Counsel's motion in limine to exclude certain
16 opinions of Respondents' expert witness Richard Abrams,
17 M.D.: Denied

18

19 Respondents' motion to allow direct examination to
20 proceed before cross examination of party witnesses
21 that are called by the Government: Denied

22

23 Respondents filed a motion in limine to exclude
24 investigational hearing transcripts: Denied

25

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1 INDEX OF RULINGS

2

3 Respondents motion in limine to exclude improper
4 laywitness opinion testimony: Denied

5

6 Respondents' motion in limine to exclude evidence of a
7 fact witness' divorce proceedings: Denied

8

9 Complaint Counsel's motion to exclude the declaration
10 and deposition transcript of George J. Serafin:
11 Granted

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1 P R O C E E D I N G S

2 - - - - -

3 JUDGE CHAPPELL: All right. Let me call to
4 order Docket 9401 in Illumina, Inc. and GRAIL -- and
5 that's GRAIL in all caps -- Inc. I'll start with the
6 appearances of the parties, the Government first.

7 MS. MUSSER: Good afternoon, Your Honor. Susan
8 Musser for Complaint Counsel, and I am joined by my
9 colleague Steve Mohr, who's in the room with me, and
10 Jean McNeil.

11 JUDGE CHAPPELL: All right.
12 For Respondents? I cannot hear you.

13 MR. MARRIOTT: Good afternoon, Your Honor.
14 David Marriott from Cravath, Swaine & Moore for
15 Illumina, and with me my partners Richard Stark and
16 Sharon Goswami, our colleague Michael Zaken, my partner
17 Christine Varney.

18 Also on are Karl Huth, and we have several
19 representatives of our client, Your Honor, if you would
20 like us to identify them as well. That's Charles
21 Dadswell, the General Counsel of Illumina; Scott
22 Davies, who is Vice President, Legal; and Steve Keane,
23 who is also an in-house lawyer at Illumina.

24 JUDGE CHAPPELL: All right. Is that everyone?

25 MR. MARRIOTT: I believe so, Your Honor. Thank

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1 you. At least for Illumina it is.

2 JUDGE CHAPPELL: Can everyone look and verify
3 the name beneath your video is correct?

4 MR. PFEIFFER: Yes, Your Honor, it is.

5 This is Al Pfeiffer of Latham & Watkins on
6 behalf of GRAIL. With me today are my colleagues Maggy
7 Sullivan, Anna Rathbun, and David Johnson.

8 JUDGE CHAPPELL: I see. There's Josett.
9 Hello, Josett. What, do we have a backup court
10 reporter just in case? It's going to be that rough
11 today?

12 I heard Ms. Varney identified, but I do not see
13 her. Is she an active participant? I'm just making
14 sure we have the right boxes.

15 MR. MARRIOTT: She will not be an active
16 participant today, Your Honor.

17 JUDGE CHAPPELL: All right, thank you. So
18 everyone who is active is on video. Am I correct?

19 MR. MARRIOTT: Yes, sir.

20 JUDGE CHAPPELL: Good. I just don't want
21 anybody to be left out here.

22 All right. You have previously received an FAQ
23 document and been through some training sessions, and I
24 hope you understand this process. We conducted a
25 remote trial recently, and at the end, the parties and

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1 I also agreed that we didn't skip a beat. Things went
2 very well, and we felt like it wasn't an impediment at
3 all. So let's see how we do this time.

4 I'm going to go over some issues that are
5 unique to a virtual trial. Here are some points that I
6 want to emphasize or maybe additional issues relating
7 to the virtual trial, and I'm trying to do this without
8 a hard copy, so if I look to the left or right, I'm
9 trying to save trees.

10 Recording. The official court reporter is the
11 only individual permitted to record the trial.
12 Accordingly, do not video record, audio record,
13 broadcast, televise, stream, screenshot, photograph, or
14 otherwise copy the trial or any portion or parts of the
15 trial. There shall be no exceptions to this rule.

16 Regarding who can be present at trial, as you
17 have been informed, this trial is not being publicly
18 broadcast; however, it is being made available via
19 phone link for those who want to participate. Only
20 those persons authorized to view the trial can do so
21 via the Zoom link they are sent.

22 You are not to share your Zoom link with anyone
23 who is not authorized. You are not to shoulder-surf or
24 allow anyone to shoulder-surf or view the trial. You
25 are not authorized -- if you are not authorized and

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1 want to view the trial, you must do so through your own
2 Zoom link, which will be provided to authorized persons
3 for each day of trial.

4 Anyone else who wants to access the trial may
5 do so over the telephone option that was issued by the
6 FTC Press Office, and I understand we have a lot of
7 people listening in. Welcome to the public.

8 If you are not one of the designated counsel
9 who is speaking today, you must have your audio and
10 video off at all times. If you are counsel who are
11 speaking today, you must have your video on at all
12 times and your audio on only when you are speaking.

13 During the trial, all of us at some point will
14 start speaking with the audio muted. Don't worry about
15 it. It's going to happen. When it happens, you'll be
16 reminded. Just turn it on, and we move on.

17 Regarding witnesses in the courtroom, expert
18 witnesses will be permitted in the virtual courtroom.
19 When they are not testifying, they shall turn off their
20 video and mute themselves so that they are not
21 displayed or heard.

22 Fact witnesses may not access the virtual
23 courtroom through a Zoom link or otherwise observe
24 proceedings when they are not testifying. That means
25 they're not supposed to call in either. They're not

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1 supposed to be listening or watching the trial. I'll
2 ask my staff to add that note on my agenda for next
3 trial.

4 In camera issues. I have granted in camera
5 treatment to many nonparty documents. Counsel are
6 instructed to be aware of the documents that are under
7 an order providing in camera treatment. Although I
8 have issued orders that denied without prejudice -- I'm
9 sorry.

10 Also, I have issued orders that denied without
11 prejudice a number of motions, including I believe
12 Respondent GRAIL, but I think there's an update and I
13 did get that order out today. I know I approved it
14 earlier today for GRAIL.

15 If you wish to use a document that I haven't
16 had the time yet to rule on, whether it should be
17 granted in camera treatment -- in other words, it's
18 pending in camera treatment or something out of the
19 blue that you think is in camera -- I can grant
20 provisional in camera treatment to such documents to
21 allow you to treat them as in camera until such order
22 can be issued.

23 I will remind you that if I grant in camera or
24 provisional in camera treatment, you must make a note
25 to follow up with a motion so that the record is

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1 complete, the circle is completed there on those
2 documents.

3 If counsel wish to question a witness about the
4 confidential contents of a document -- that is, a
5 document which is in camera or has provisional in
6 camera treatment -- counsel need to request that the
7 Court move into an in camera session. If you haven't
8 done one of these before, you will catch on quickly
9 after we do the first one.

10 To create the least disruption to the trial
11 process, counsel shall segregate their questioning in
12 such a manner that all questions on in camera material
13 will be grouped together and be dealt with in one
14 session. This works better if you ask any questions
15 related to in camera information at the beginning or
16 end of your examination.

17 For example, Complaint Counsel calls a witness.
18 They have some in camera questioning. At the end of
19 their examination, they move for an in camera session,
20 and we cover the in camera information. The next
21 attorney up conducting cross would then, to make things
22 flow, handle their in camera portion of their
23 examination.

24 Things work a lot better that way, and it's
25 better for the public who is excluded every time we go

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1 into in camera session and they have no idea when we're
2 coming back. If I have some idea, I let them know
3 before they are cut off from the trial.

4 When we do move into in camera session, persons
5 who are not allowed to see or hear in camera materials,
6 such as Respondents' in-house counsel or corporate
7 representatives, will be moved out of the virtual
8 courtroom to the virtual waiting room where there is no
9 audio or video feed. The telephone feed to the public
10 will also be muted.

11 Experts may remain in the virtual courtroom. I
12 will need the lawyers from both sides to verify that
13 there is no one in the room with them who is not
14 allowed to see or hear in camera material before we
15 move into an in camera session. To make things flow
16 much more easily, I have a couple paragraphs that I
17 will cover with the parties every time we move into in
18 camera to remind you.

19 One thing I'm very concerned about is
20 protecting the in camera information of nonparties,
21 third parties that don't have any skin in the game
22 here, and we're not going to release their information
23 to the public. That's one thing I am going to be
24 watching out for, and I request the parties do the
25 same. It's one thing -- I expect Illumina's attorneys,

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1 GRAIL's attorneys, you're going to protect your
2 information, but let's all try to protect nonparties'
3 information.

4 I am going to make a ruling here. I have a
5 number of rulings I am going to make here. I'm sorry,
6 I have an annoying email reminder that popped up on a
7 screen and blocked what I was trying to read here.

8 I have pending Respondent Illumina's expedited
9 motion to modify the protective order. Respondent
10 requests a limited modification to the protective order
11 to allow two Illumina in-house attorneys to hear
12 confidential testimony during the hearing and to orally
13 discuss that testimony with Illumina's outside counsel
14 on the condition that they do not take notes regarding
15 any confidential testimony or documents or receive any
16 written materials or transcripts referencing
17 confidential testimony or documents.

18 Complaint Counsel opposes the motion and
19 contends there are no exceptions to the standard
20 protective order for in-house counsel and that Illumina
21 has not articulated any valid basis for an exception.
22 Complaint Counsel further asserts that the in-house
23 counsel at issue are involved in a competitive
24 decision -- I'm sorry. Complaint Counsel further
25 asserts that the in-house counsel at issue are involved

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1 in competitive decision-making for Illumina.

2 From the arguments made in the various in
3 camera motions, it is clear -- and by the way, there
4 have been a number of in camera motions -- it is clear
5 that the evidence in this case will include proprietary
6 technology information, medical research, and
7 scientific data, product research, and detailed
8 information about the technical specifications of
9 testing products. These materials are highly
10 sensitive. Respondents are well represented by outside
11 counsel. Therefore, Illumina's motion to modify the
12 protective order is denied.

13 And for the benefit of the parties and the
14 court reporters, I'm going to be making a number of
15 rulings. We had so many motions flying in here in the
16 last couple weeks, it was impossible to issue written
17 orders on all the motions. So for the benefit of the
18 court reporter and the attorneys, I am going to try to
19 make note to let you know when a ruling is coming here
20 during this proceeding.

21 Excuse me while I try to clear my screen. This
22 pop-up won't leave.

23 So that this entire hearing isn't conducted in
24 camera, I want everyone to be clear about one thing.
25 General statements that are derived from confidential

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1 information are not protected. For example, I have
2 seen the name of GRAIL's product, blood testing
3 product, I have seen that name, Galleri. I've seen it
4 in all kind of public documents, yet I see it marked in
5 camera and confidential in a number of documents.
6 There's an example of something that -- and there are
7 many of them -- that's not going to be in camera.

8 General statements that are derived from
9 confidential information are not protected. Unless you
10 are getting into specific details contained in in
11 camera materials, you should conduct your questioning
12 during a public session. We reserve in camera for when
13 it is necessary, but when it is necessary, we will do
14 it to protect information.

15 I don't want anyone to feel like there's some
16 chilling effect based on what I'm saying to go in in
17 camera. When in doubt -- and that's our rule. When in
18 doubt, ask for an in camera session. By the way, it's
19 a good time to point out, if one party thinks another
20 party is or a witness is speaking about something in
21 camera, speak up and let us all know. We will stop and
22 we will verify.

23 Because of the sensitivity of information about
24 this nascent industry, I gave broad leeway to
25 nonparties' requests for protection of testimony given

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1 in depositions or investigational hearings; however,
2 testimony at trial will not be protected unless it
3 reveals details of confidential, proprietary, or
4 commercially sensitive information.

5 For example, questions about whether a nonparty
6 is or was developing a product to compete with
7 Respondent's product are general and do not rise to the
8 level of in camera treatment. Questions about
9 specifications about such tests may be in camera and
10 thus protected.

11 I'm now going to go over some trial dates for
12 this trial and when you can expect that we will or will
13 not have trial. When we are in session, you can expect
14 trial to begin at 9:45 a.m. and go until about 5:30
15 p.m. Should counsel need more time, for example, in
16 order to finish the testimony of a witness, the hours
17 may be extended with prior approval.

18 Depending on how the events of the day unfold,
19 we will take a one-hour break and a ten-minute break in
20 both the morning and afternoon session. I know you're
21 thinking you already know this because we sent out a
22 logistics memo or a logistics email. However, there
23 are many, many people listening in right now that did
24 not know that, and some of them listen to everything,
25 so they've got to plan their day as well.

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1 I am now going to ask the parties to give me an
2 estimate of how long you think your case will take to
3 present. I will start with the Government.

4 MS. MUSSER: Yes, Your Honor. We expect to be
5 able to finish up the week of 9/13. And my apologies,
6 let me know if you can't hear me because of this mask.
7 Unfortunately, given our rules, we have to be masked if
8 there is more than two people, but I am happy to speak
9 up, and, of course, we can troubleshoot any tech as it
10 comes up, Your Honor.

11 JUDGE CHAPPELL: Okay. Just so I'm clear, you
12 said if it's more than two people, you have to wear a
13 mask?

14 MS. MUSSER: More than one. I misspoke, Your
15 Honor. If it's more than one, we have to be masked up,
16 and my colleagues Steve Mohr and Jean McNeil are in the
17 room with me.

18 JUDGE CHAPPELL: What if he's six feet away?

19 MS. MUSSER: I can ask. Unfortunately, the
20 guidance has been pretty tough, and we haven't been
21 able to get much leeway on that, but I can ask again,
22 Your Honor.

23 JUDGE CHAPPELL: Well, there is one thing that
24 is clear. We could all hear you a lot better without a
25 mask.

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1 Does everyone agree with that? You may not.

2 Anyone not agree with that? It would be better -- I am
3 not going to violate any -- any rules, whether they're
4 arbitrary or not. I don't know about -- I thought the
5 six-foot rule was still in effect, but I don't know.
6 I'm not in that room you're in.

7 So why don't you have someone check on that.
8 I'm doing most of the speaking today, so it doesn't
9 matter a whole lot, but --

10 MS. MUSSER: Yes, and --

11 JUDGE CHAPPELL: -- yeah, see if there is some
12 kind of procedure whereby we can hear the speaker not
13 wearing a mask.

14 MS. MUSSER: Okay.

15 JUDGE CHAPPELL: If you need to wear it, wear
16 it, okay?

17 MS. MUSSER: Thank you, Your Honor. We will
18 ask again. And just so you know, for tomorrow, we have
19 already planned a work-around for opening statements,
20 so you won't have the mask issue at least for tomorrow,
21 but we will try and take your guidance into effect
22 going forward.

23 JUDGE CHAPPELL: All right. And, again, I
24 don't want to violate any of the rules, but I think you
25 understand it's important that we all hear you clearly.

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1 MS. MUSSER: Of course, Your Honor. Of course,
2 Your Honor.

3 JUDGE CHAPPELL: All right. And repeat that
4 time you think you need for trial?

5 MS. MUSSER: We're hoping to finish up the week
6 of 9/13. Of course, that depends on blackout dates and
7 whether or not we will be able to present our experts
8 by trial deposition, but the week of 9/13 is what we're
9 shooting for.

10 JUDGE CHAPPELL: Okay. And with that estimate,
11 are you assuming that you will or will not be calling
12 witnesses who are employees of Respondents?

13 MS. MUSSER: We are assuming that we will be
14 calling employees of Respondents.

15 JUDGE CHAPPELL: All right, thank you.

16 Now, let me have your trial estimates from
17 Respondents.

18 MR. MARRIOTT: Your Honor, David Marriott for
19 Illumina. Our best estimate would be the first full
20 week of October, so probably 2 1/2 weeks beyond what is
21 presented by Complaint Counsel. Obviously, some of our
22 witnesses are being called in their case, and so we
23 will cover that there, but I anticipate two, 2 1/2
24 weeks beyond what the FTC does, Your Honor.

25 JUDGE CHAPPELL: Are you speaking for both

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1 Respondents?

2 MR. MARRIOTT: I meant to by that statement,
3 yes, sir.

4 JUDGE CHAPPELL: All right. And in that date
5 projection, are you assuming you will or will not be
6 calling your employees for the first time?

7 MR. MARRIOTT: I'm assuming that many of them
8 will be called for the first time. I'm assuming some
9 of them will be called in the FTC case and that we will
10 endeavor to do the cross examination or whatever we're
11 going to call it, our examination of those witnesses in
12 the FTC case.

13 We have some concern that things could come up
14 after those witnesses testify that may require them to
15 respond later in our case, but we're going to make
16 every effort, Your Honor, to have our witnesses go once
17 and only once.

18 JUDGE CHAPPELL: All right, thank you.

19 Let's talk about specific trial dates now. You
20 have already been provided with the dates that we will
21 not be in trial. I'll repeat those for the benefit of
22 the public. These are dates of no trial.

23 September 1 -- these are all dates in
24 September -- 1, 6, 14, 15, 22, 29, and 30th. Also,
25 trial on August 26th will begin at 11:45 a.m. In

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1 addition to the September dates, I have one more day
2 which we will not be in court, and that is October 5.
3 That will get us into the first week of October, and
4 near that date, if it looks like we're not going to end
5 the trial, I will take the calendar out further and let
6 you know what dates we won't be in trial.

7 I endeavor to have trial -- and sometimes other
8 things happen and parties request days off. I endeavor
9 to have trial four full days a week. That gives
10 everyone involved, including the Judge, time to work on
11 other cases. I have been where you are, and I know
12 that there are other things going on.

13 The dates I just went over in September, some
14 of these dates are related to an unavoidable scheduling
15 conflict that I have. Should that change, I will let
16 you know as soon as I know, and if you can schedule
17 witnesses and are available, we may have trial on a few
18 of those days.

19 Let's say, for example, I realize that I'm
20 available September 29 or 30, I would let you know as
21 soon as I know, and if you can schedule witnesses and
22 make it, then that would become a trial date.

23 In addition, I received a request from at least
24 one of the parties that I hold hearings -- that I not
25 hold hearings on the following dates: September 7, 8,

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1 and 16. That request is granted. So we will not be in
2 court, in addition to the dates I already gave you,
3 September 7, 8, and 16. That's at the party request.

4 I've also received from the Government a
5 request to go late on August 24th, and I believe that's
6 tomorrow, to accommodate a witness schedule. That
7 request is granted. We will go late on the 24th, but
8 no later than 7:00 p.m.

9 Madam Court Reporter, is that okay with you?

10 THE REPORTER: Yes, Your Honor.

11 JUDGE CHAPPELL: The amount of trial -- the
12 amount of time we have for trial is limited by Rule
13 3.41(b) -- (b) as in boy -- limited to no more than 210
14 hours. If we assume 6 1/2-hour days with the breaks,
15 this equates to about 32 days total. Each side is
16 allotted no more than half of that time. So that's
17 about 16 days each.

18 Have the parties developed a system or do you
19 think we're going to need to in this case?

20 MS. MUSSER: It is certainly my hope that we
21 don't need to in this case, but --

22 MR. MARRIOTT: I think, Your Honor, we share
23 that hope, and if we can work together to avoid any
24 downtime and have a system that works for everyone, we
25 are going to make every effort to do that.

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1 JUDGE CHAPPELL: All right, thank you.

2 All right. Let's talk about witnesses. First,
3 expert witnesses. I have two issues to raise with
4 respect to expert witnesses. One relates to various
5 motions in limine that have been filed. The other
6 relates to the presentation of expert testimony by
7 video. I'll first cover motions in limine on experts.

8 Regarding these motions, evidence should be
9 excluded on a motion in limine only when the evidence
10 is clearly inadmissible on all potential grounds.
11 That's my standard. Relying on Daubert -- some say
12 "Daubert," I'll say Daubert -- three of the
13 Respondents' motions in limine challenge certain
14 opinions or testimony of the Government's proffered
15 expert witnesses.

16 One of Complaint Counsel's motions in limine
17 challenges certain opinions or testimony of one of
18 Respondents' proffered expert witnesses. All of the
19 motions were opposed, contending that the standards for
20 precluding expert witnesses' testimony have not been
21 met.

22 Specifically, Respondents filed a motion in
23 limine to exclude expert testimony of Dr. Fiona Scott
24 Morton, a motion in limine to exclude certain testimony
25 of rebuttal expert witness Dr. -- I am going to

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1 pronounce this phonetically -- Amol Navathe, a motion
2 in limine to exclude certain testimony of rebuttal
3 expert witness Dr. Dov Rothman.

4 Complaint Counsel filed a motion in limine to
5 exclude certain opinions of Respondents' expert witness
6 Richard Abrams, M.D.

7 Here are my rulings. The Court's role as a
8 gatekeeper pursuant to Daubert to prevent expert
9 testimony from unduly confusing or misleading a jury
10 has little application in a bench trial. No jury. I
11 don't need to screen info to protect the jury, just the
12 Judge. The better approach under Daubert in a bench
13 trial is to permit the expert testimony and allow
14 vigorous cross examination and presentation of contrary
15 evidence to test the opinion. The challenges raised to
16 the expert witness opinions are best addressed through
17 cross examination.

18 Therefore, the following motions in limine are
19 denied: Respondents' motion in limine to exclude
20 expert testimony of Dr. Fiona Scott Morton;
21 Respondents' motion in limine to exclude certain
22 testimony of rebuttal expert witness Dr. Amol Navathe;
23 Respondents' motion in limine to exclude certain
24 testimony of rebuttal expert witness Dr. Dov -- that's
25 D-O-V -- Rothman; and Complaint Counsel's motion in

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1 limine to exclude certain opinions of Respondents'
2 expert witness Richard Abrams, M.D.

3 Susanne, did you get all that?

4 THE REPORTER: Yes, Your Honor.

5 JUDGE CHAPPELL: Thank you.

6 The parties should be aware that, as Judge, it
7 is my prerogative and responsibility to cut off
8 questioning of an expert witness during examination
9 when venturing into areas that the witness is not
10 qualified to opine upon. Just letting you know.
11 Expert witnesses are not allowed to run wild in this
12 courtroom.

13 I also have a request -- I don't think it's a
14 motion -- but I have a request regarding presentation
15 by video testimony. Because this trial is being
16 conducted remotely, the parties were encouraged to
17 submit trial depositions for their expert witnesses.
18 In a joint status report, Complaint Counsel stated its
19 intent to submit trial depositions for its three expert
20 witnesses in lieu of presenting their testimony at
21 trial.

22 In that same joint status report, Respondents
23 stated that they do not object to Complaint Counsel's
24 use of trial depositions to present their experts'
25 direct testimony, but requested to cross examine each

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1 of Complainant's expert witnesses live at trial.

2 Cross examination is properly conducted at the
3 trial deposition under these circumstances, and
4 Respondents were on notice and allowed to conduct their
5 cross examination in the deposition. Accordingly, the
6 Respondents' request to conduct another cross
7 examination of each of Complaint Counsel's expert
8 witnesses at trial is denied.

9 Let's talk about fact witnesses.

10 MR. MARRIOTT: Your Honor, may --

11 JUDGE CHAPPELL: Go ahead.

12 MR. MARRIOTT: I apologize. David Marriott for
13 Illumina. I want to just make sure I understand the
14 ruling, as I'm concerned it might be based on an
15 inaccurate testimony of what happened. The testimony
16 that at least I understand Complaint Counsel wishes to
17 present from their experts has not yet been taken by
18 deposition, so the witness has also, therefore, not
19 been cross examined by deposition. That' hasn't
20 happened.

21 JUDGE CHAPPELL: I thought it was testimony in
22 a trial deposition that was taken with all parties
23 noticed.

24 MR. MARRIOTT: No, there was no -- the
25 witnesses were deposed previously, Your Honor, but the

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1 so-called "trial deposition" that was referenced in the
2 Court's scheduling order, that never happened. I
3 understand Complaint Counsel's proposal is to do that
4 at some point during the trial on an off day.

5 MS. MUSSER: Your Honor, if I may?

6 JUDGE CHAPPELL: You may.

7 MS. MUSSER: Mr. Marriott is correct. We were
8 providing notice to the Court that we intend to conduct
9 a trial deposition of Dr. Scott Morton. When we
10 informed Respondents, they said that they would agree
11 to -- that the direct be in trial deposition but not
12 the cross, and it's our request that the entire direct
13 and cross be done via trial deposition. Otherwise, we
14 would intend to present Dr. Scott Morton at trial live,
15 so to speak.

16 JUDGE CHAPPELL: Are these trial depositions
17 scheduled?

18 MS. MUSSER: No, Your Honor, not yet.

19 JUDGE CHAPPELL: You are waiting on my ruling?

20 MS. MUSSER: Yes, Your Honor.

21 JUDGE CHAPPELL: Well, it wasn't clear to me
22 that they hadn't been conducted yet. Maybe I missed
23 that.

24 MS. MUSSER: Your Honor, I apologize if it was
25 unclear.

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1 JUDGE CHAPPELL: Well, my intent in suggesting
2 trial depositions in lieu of live testimony was to move
3 things along, and these are not fact witnesses. So to
4 the extent that trial depositions are taken during
5 trial or otherwise, my ruling stands. Conduct whatever
6 cross you want at the trial deposition.

7 MS. MUSSER: Thank you, Your Honor.

8 MR. MARRIOTT: Understood. Thank you, Your
9 Honor.

10 JUDGE CHAPPELL: And that means you're on
11 further notice to conduct whatever cross you need,
12 Counselor.

13 MR. MARRIOTT: Thank you. We got it.

14 JUDGE CHAPPELL: Let's talk about fact
15 witnesses. Based on the filings I've seen, the
16 Government has listed 20 fact witnesses. Respondents
17 also have listed 20 fact witnesses. Thankfully, many
18 of these are on both -- are on the same list or the
19 same name is on both lists. How many fact witnesses do
20 you actually anticipate calling? I'll start with the
21 Government.

22 MS. MUSSER: Your Honor, right now, our intent
23 is to present all 20. That being said, of course, we
24 recognize the need for an efficient and noncumulative
25 trial, so to the extent that that can change, we

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1 certainly will keep that in mind.

2 JUDGE CHAPPELL: What was that number again? I
3 can't understand you.

4 MS. MUSSER: Oh, I'm sorry. All 20 of them.

5 JUDGE CHAPPELL: Okay.

6 Respondents?

7 MR. MARRIOTT: Your Honor, we --

8 JUDGE CHAPPELL: Assuming those 20 are called
9 by the Government.

10 MR. MARRIOTT: We would -- in that case, Your
11 Honor, we would call virtually all of ours, but I
12 anticipate there's at least one we will drop, and we're
13 going to make every effort, if possible, to look for
14 others, but at the moment there's only one I anticipate
15 we would probably drop.

16 JUDGE CHAPPELL: All right. Let me make this
17 clear. When a witness is testifying, we will finish
18 with that witness and not recall that witness. That
19 means that both sides will ask whatever questions they
20 have for the witness at the time the witness is first
21 called. If someone thinks they have a reason to recall
22 a witness, you can make a motion, and I'll consider it.

23 This leads me to a request on presentation of
24 testimony. In one of the pretrial motions, Complaint
25 Counsel has listed seven party witnesses and

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1 Respondents have listed the same seven witnesses, plus
2 an additional eight party witnesses. Respondents filed
3 a motion to allow direct examination to proceed before
4 cross examination of party witnesses and requests that
5 for party witnesses appearing on both sides' witness
6 lists, that the Court permit Respondents to first
7 present direct testimony of each witness, followed by
8 Complaint Counsel's examination of each witness.

9 Respondents argue that presenting direct
10 testimony of Respondents' witnesses before they are
11 cross examined by Complaint Counsel will streamline the
12 process and allow the Court to hear their testimony in
13 a logical manner -- a more logical manner than
14 permitting complaint counsel to elicit hostile cross
15 examination testimony first.

16 Just so you know, as I'm reading this, I'm
17 inserting missing words sometimes so it will make more
18 sense.

19 Complaint Counsel -- I'm sorry. Complaint
20 Counsel argues that, as the party with the burden of
21 proof, it has the prerogative to question the witnesses
22 first, and it's a misnomer to refer to their
23 examination as "cross," because the Government intends
24 to call certain adverse party witnesses to support its
25 case in chief, not specifically to respond to testimony

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1 elicited through Respondents' direct examination. The
2 Government further argues that Respondents' proposal is
3 unwieldy and has not been implemented in any other
4 trial.

5 I find the Government's argument persuasive.
6 Respondents' proposal, if implemented, would be
7 unprecedented. They have not presented any compelling
8 reason to divert from normal practice. Accordingly,
9 Respondents' motion to allow direct examination to
10 proceed before cross examination of party witnesses
11 that are called by the Government is denied.

12 Because we have two Respondents here, you need
13 to coordinate the direct and the cross when both
14 Respondents will be examining a witness to prevent
15 duplication in the record and avoid wasting time. Now,
16 I didn't know if you had worked this out or not, but on
17 most or all witnesses, do you intend to have one person
18 conducting the witness examination, or for almost every
19 witness, do you intend to have both Respondents
20 conducting examination?

21 MR. MARRIOTT: Your Honor, I believe that our
22 expectation is that we will have one lawyer conduct the
23 examination if at all possible.

24 JUDGE CHAPPELL: Thank you. And, of course,
25 the examining attorney will be the one who is allowed

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1 to object.

2 MR. MARRIOTT: Understood.

3 JUDGE CHAPPELL: I'll briefly go back to in
4 camera motions. I may have misspoke earlier. There
5 are still a couple pending that were denied without
6 prejudice, I think for both Respondents, and those have
7 not gone out yet but will go out soon.

8 Let's talk about the use of exhibits with
9 witnesses. When we have an in-person trial -- I guess
10 I should call that a normal trial -- the parties
11 usually prepare binders for witnesses and provide a
12 copy of that binder for me and for my staff. I have
13 seen in the courtroom the witness stand, it's like an
14 ice fort. The witness has to go around binders to sit
15 down. We can't do that here, at least like we do in
16 the courtroom.

17 First of all, my staff and I do not need
18 binders of exhibits used with witnesses, either in hard
19 copy or electronically; however, you do need to work
20 out a way ahead of time to provide the witness with
21 exhibits you intend to use with that witness. Find
22 some way to get a binder in front of the witness, if
23 possible, so that we may move along with trial.

24 Have the parties discussed that or worked out
25 anything regarding getting documents that you're going

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1 to use with a witness in front of the witness?

2 MS. MUSSER: Your Honor, we actually just met
3 and conferred about that, and I think we're close to
4 resolution, and we'll be able to work something out,
5 but we're still ironing out the details.

6 JUDGE CHAPPELL: Love to hear about those
7 meet-and-confers. You can't have too many of those.
8 Thank you.

9 Regarding cross examination of witnesses, it's
10 my job to make sure the trial moves along without undue
11 delay. In that regard, should I find that one side is
12 abusing a reasonable time for cross exam -- for
13 example, taking two or more times the time taken on
14 direct -- I will impose limits on the time allowed for
15 cross.

16 However, I'm not just going to do that out of
17 the blue. I will notify you ahead of time should I
18 decide to do this so you may plan and prepare
19 accordingly. I have had examples where a witness was
20 on the stand for two hours and the cross lasted three
21 days. Not acceptable. Barely tolerable, but not
22 acceptable.

23 Rebuttal witnesses. I want to caution the
24 parties that if any party wishes to offer a rebuttal
25 fact witness, the request shall be made in writing in

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1 the form of a motion to request a rebuttal witness as
2 soon as possible. That motion shall include the name
3 of any witness being proposed and a detailed
4 description of the rebuttal evidence being offered.

5 That motion shall also include a cite to the
6 record by page and line number to the evidence you
7 intend to rebut. That motion shall demonstrate that
8 the witness the party seeks to call has previously been
9 designated on the witness list. In other words, you
10 don't get to just say I want a rebuttal witness. You
11 are going to have to point to page and line number of
12 what you intend to rebut, among the other things I've
13 just mentioned here. I'm letting you know up front
14 what you're going to need to do for rebuttal. That way
15 I eliminate the whining, whimpering, and snoffering
16 when your request is denied later.

17 Let's talk about exhibits. If demonstrative
18 exhibits are used with a witness, the exhibit will be
19 marked and referred to as a demonstrative exhibit for
20 identification only. I used to tell the parties that
21 demonstrative exhibits were not encouraged, but the
22 parties in the last trial did a good job of not overly
23 abusing and using demonstrative exhibits and keeping
24 track of them on the record.

25 Part of my problem with demonstratives is

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1 sometimes they lead to confusion. They're not evidence
2 and can't be cited for evidence in your briefing. Any
3 demonstrative exhibits referred to by any witness will
4 be included in the trial record, but they may not be
5 cited to support any disputed fact. That's why they're
6 called demonstrative. If someone cites to a
7 demonstrative exhibit to support a fact that's in
8 dispute in their post-trial brief, I expect the
9 opposing party to point that out in their reply brief.

10 Regarding withheld documents, if either party
11 has withheld documents during discovery from the other
12 side and that is pointed out to me, such withheld
13 documents will not be admitted.

14 Regarding depositions and investigational
15 hearing transcripts, depositions and investigational
16 hearing transcripts in this matter are generally deemed
17 admissible under Commission rules. Under 3.43(b),
18 relevant material and reliable evidence shall be
19 admitted. Evidence that constitutes hearsay may be
20 admitted if it is relevant, material, and bears
21 satisfactory indicia of reliability so that its use is
22 fair. If meeting those standards, depositions and
23 investigational hearings shall be admissible and shall
24 not be excluded solely on the ground that they are or
25 contain hearsay.

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1 Here comes a ruling. Respondents filed a
2 motion in limine to exclude investigational hearing
3 transcripts, 34 listed in their entirety. Complaint
4 Counsel opposed the motion relying on the provisions of
5 the rule I just covered with you. Based on that rule,
6 3.43(b), the motion in limine to exclude
7 investigational hearing transcripts is denied.

8 To the extent that testimony from an
9 investigational hearing transcript is prejudicial to
10 Respondents, I expect that to be pointed out in reply
11 briefs to any proposed findings that rely on testimony
12 given in an investigational hearing. That means
13 they're coming in under the rule, but it doesn't mean
14 that the Judge has determined that whatever's cited to
15 prove a fact is reliable. So the battle's not over.
16 Let me rephrase that. As an Army Colonel, I should do
17 better. The war's not over, just the first battle.

18 MR. HUTH: Thank you, Your Honor. Karl Huth,
19 Huth Reynolds, for Illumina. Just to make sure I'm
20 clear on the process with respect to these transcripts?

21 JUDGE CHAPPELL: Go ahead.

22 MR. HUTH: I just want to clarify. To the
23 extent that testimony is contained in these exhibits
24 that are being offered in full and is not cited in the
25 post-trial briefing or during the trial in this

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1 matter --

2 JUDGE CHAPPELL: It's vapor. It's gone. You
3 don't need to worry about it.

4 MR. HUTH: -- it will not be part of the
5 permanent record, correct?

6 JUDGE CHAPPELL: It's in the record. Anything
7 that's offered, whether it's admitted or not, is in the
8 record.

9 MR. HUTH: But it will not be considered part
10 of the record on appeal in this case if there is
11 something that is not actually submitted in post-trial
12 briefing?

13 JUDGE CHAPPELL: It will be in the record on
14 appeal because they are admitted. I can't account for
15 what someone will do on an appeal. I can tell you what
16 I will do.

17 MR. HUTH: Okay. And, Your Honor, without --
18 without trying to be argumentative, that goes to the
19 heart of the motion to exclude -- or not necessarily to
20 exclude, but, rather, to defer admitting these entire
21 transcripts into the record until the evidence is
22 actually cited and there's an opportunity to object,
23 because with 6000 pages of IH transcripts, there's
24 really no -- no practical way for us to raise every
25 objection to everything in those transcripts, rather

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1 than just responding to what Complaint Counsel seeks to
2 put in on the post-hearing briefs.

3 JUDGE CHAPPELL: Well, you may have done this,
4 you may have not, but if you have ever handled appeals,
5 it's pretty unlikely you are going to cite some new
6 proposition that wasn't cited in the underlying case to
7 prove some point. If you do, that should be a pretty
8 weak argument or a weak point in my opinion, but I've
9 got to rule on point here pretty much. My hands are
10 tied on this. This is not my rule. I didn't write
11 this rule. Let's just say that rule wouldn't be
12 written that way if I wrote it, but --

13 MR. HUTH: Understood, Your Honor.

14 JUDGE CHAPPELL: -- but as the person making
15 this ruling in this case, anything that's cited in the
16 post-trial brief by the Government, you'll have the
17 right to attack that in your reply. Beyond that, it's
18 out of my control.

19 MR. HUTH: Thank you, Your Honor.

20 JUDGE CHAPPELL: I will say that this is not a
21 ruling -- the denial of the motion in limine to exclude
22 the investigational hearing transcripts, it's not a
23 ruling on the motion to exclude the transcript of
24 Dr. Spetzler of Caris -- Caris? -- Caris Life Sciences,
25 Inc., which is part of the motion in limine concerning

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1 Caris. I will deal with that separately later.

2 Regarding objections within depositions and
3 investigational hearing transcripts, I didn't realize
4 how many times I had to say investigational hearing
5 transcripts. I am now going to say IHTs. Both sides
6 stated in their objections to exhibits that their
7 objections to depositions incorporate the objections
8 that were raised during the depositions.

9 Since we need to finish this trial sometime
10 this year, I am not going to rule on such objections in
11 advance of trial. I will rule on them when necessary
12 and when need there be. That means if excerpts from
13 depositions are cited to by a party in a post-hearing
14 proposed finding, the opposing party shall note any
15 objection it has to the excerpt regardless of whether
16 it raised the objection in the deposition, and that
17 should be pointed out in the reply to the proposed
18 finding.

19 So I want to make this clear. You didn't waive
20 any objections if you didn't make them during the
21 deposition. This is about the truth, getting to the
22 truth, and this is about fairness and justice. I'm not
23 going to -- nobody's going to lose the case based on
24 the fact you were checking email when a question was
25 asked during a deposition. I have found this to be

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1 something that is very rarely an issue. Deposition
2 excerpts generally are what they are. I don't think
3 I've seen many smoking guns within the covers of a
4 transcript of a deposition.

5 If you don't raise an objection to some excerpt
6 in your reply brief, then you will have waived your
7 objection. Did everyone understand that?

8 MR. MARRIOTT: Understood, Your Honor.

9 MS. MUSSER: Yes, Your Honor.

10 JUDGE CHAPPELL: So I have a ruling here
11 relating to this point. Respondents have filed a
12 motion in limine to exclude improper lay witness
13 opinion testimony. This motion seeks to preclude
14 admission of alleged lay witness opinion testimony
15 contained in the deposition and IHT designated as
16 exhibits. The Government has opposed the motion,
17 arguing that the request to exclude the transcripts in
18 their entirety is improper and the better procedure is
19 to raise objections in post-trial briefings if
20 objectionable testimony is relied upon.

21 As I have basically just said, Respondents'
22 motion in limine to exclude improper lay witness
23 opinion testimony is denied. Respondents can raise
24 objections to such testimony in post-trial briefing if
25 relied upon by the Government to support a proposed

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1 finding of fact. And if you have an objection to that
2 type of testimony, don't be afraid to cite to the Rules
3 of Evidence. It's very clear what's required for lay
4 opinion testimony, and if those standards aren't met,
5 this Judge doesn't allow the testimony. The rules are
6 written for a reason.

7 If you talk to anyone who's been in a trial
8 with this Judge, you'll find I go by the book. The
9 book's important. Without the book, what do we have?
10 Anarchy. The books are important. We all follow the
11 rules.

12 Let's talk about objections to exhibits
13 generally. I'm moving into now what I consider the
14 unfortunate part of this proceeding. Each side has
15 filed numerous objections to almost all of each other's
16 exhibits. I'm, frankly, disappointed and dismayed to
17 see the number of objections made, particularly from
18 Complaint Counsel, who I would assume know the
19 Commission's Rules of Practice and how these things
20 work. This number of objections is just completely and
21 utterly unacceptable.

22 We have a fairly relaxed standard for
23 admissibility. That doesn't mean it's a relaxed
24 standard for proving a point in contention or dispute,
25 but for admissibility. You all should be aware of the

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1 fact that the standards are relaxed here. I believe
2 you can work out the objections you have to most of
3 these documents fairly easily.

4 Before I go into the next portion of my agenda,
5 I'd like for both parties to give me the current status
6 of your objections, because hopefully you've worked
7 some of these out.

8 I'll hear from the Government first.

9 MS. MUSSER: Yes, Your Honor. I think we have
10 good news on that front. Again, we were meeting and
11 conferring this morning on that exact issue, and we
12 have put together a JX 2 per this Court's request that
13 resolves almost all of the issues. The only two
14 categories of documents that were not on that list are
15 documents that had a possible motion in limine pending,
16 which we will be able to resolve given this Court's
17 guidance, as well as four documents that I think after
18 meeting and conferring and more information from
19 Respondents, I think we'll be able to handle. So we
20 hear you, and hopefully we'll be able to get you that
21 JX 2 today after this proceeding.

22 JUDGE CHAPPELL: All right. That sounds like
23 good news.

24 Anything to add for Respondents?

25 MS. GOSWAMI: Yes. This is Sharon Goswami for

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1 Illumina.

2 So if I may, Your Honor, it is correct that
3 Respondents and Complaint Counsel have agreed to JX 2;
4 however, Complaint Counsel has not actually dropped any
5 of their objections, and although Respondents have
6 largely stuck with the same objections that we lodged
7 before Your Honor, and as we understand it, both sides
8 are reserving those objections to be able to be
9 reraised in post-trial briefing. So those objections
10 are still things that we -- that both sides have
11 reserved for post-trial briefing.

12 MS. MUSSER: And, Your Honor, if I may respond,
13 just to clarify, to make sure we're on the same page?

14 JUDGE CHAPPELL: Please do.

15 MS. MUSSER: So I agree with Ms. Goswwami;
16 however, to clarify, Complaint Counsel's position is
17 that those are just -- the objections remaining are
18 simply objections. So just as Your Honor explained, we
19 could object in any reply finding and just preserve our
20 abilities to do so. I just wanted to make sure that
21 was clear.

22 JUDGE CHAPPELL: Anything further?

23 MS. MUSSER: No, Your Honor. Thank you.

24 JUDGE CHAPPELL: All right. If a document
25 meets the Commission's standard for admissibility, it

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1 will be admitted. This is a bench trial, and I want to
2 point out, just because a document is admitted, doesn't
3 mean much weight, any weight, or how much weight will
4 be given to the exhibit, particularly if it's cited
5 without context of a witness testimony. Both sides are
6 encouraged to point out weaknesses in the other side's
7 evidence in your post-trial filings, particularly in
8 your replies to the other side's proposed findings of
9 fact.

10 And here I will point out that the reply
11 post-trial briefs are critically important. Don't lose
12 sight of that fact. Any side can say what they want in
13 their post-trial brief. Let's see what the other side
14 has to say about it. Does it stand up under the
15 scrutiny of the other side's pointing out what may or
16 may not be actually proven or not proven? I'm not
17 going to go over this entire rule about admissibility
18 of evidence. I think I have made that point.

19 Let's talk about those remaining objections.
20 We're going to take a break soon, and I'm going to give
21 the parties time to work together on narrowing the
22 objections, the remaining objections, considering what
23 I've told you in the last few minutes. During this
24 recess, the parties will get together and agree to the
25 admission of documents that meet the standards of the

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1 rules as I've just gone over. I expect the parties to
2 be judicious with objections and pose only objections
3 that are truly necessary and valid.

4 I do want to make clear that there's no
5 reserving objections on admissibility. We're dealing
6 with that today. This is going to be done today so
7 that when trial begins, trial begins. We're not going
8 to have a witness interrupted with objections to
9 exhibits during the questioning. This is why we're
10 having this hearing today, because it will be dealt
11 with today.

12 You've still got the right -- just remember
13 this. I can't stress this strongly enough.
14 "Admissible" and "admitted" doesn't mean relied upon.
15 It doesn't mean I'm agreeing that something is reliable
16 and that it will support any point in contention or
17 dispute. I do expect the parties to narrow the scope
18 of these exhibits that you continue to disagree about.

19 Let me point this out about objections, too,
20 since this occurred in the last trial. If you've tried
21 a few cases -- and I expect all of you have, most of
22 you, at least -- there are plenty of technical
23 objections you can make when the other side is
24 questioning a witness, but stop and think, is it really
25 necessary to object to something that's technically

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1 objectionable when it doesn't have anything to do to
2 supporting your theory of the case or something that
3 actually matters to you or your client? Please keep
4 that in mind for the benefit of all of us who are
5 participating in this trial.

6 I see people nodding. I think most of you know
7 what I'm talking about. You've seen this. Hopefully
8 you haven't done this, but whenever you see this and
9 you're on the other side, you know exactly what I'm
10 talking about. You think, why are they jumping up to
11 object to that? Well, the Judge asks the same thing,
12 but not out loud. So I'm letting you know today.

13 Let me get back to the break we're going to
14 have. I do expect the parties to narrow the scope of
15 the exhibits that you continue to disagree about. With
16 respect to the exhibits that you can agree on -- and it
17 sounds like you have already begun to do this -- once
18 you have a list of documents that both sides agree to
19 or are no longer opposed, you develop a list that sets
20 forth those exhibits. That list shall be designated as
21 Joint Exhibit, with the JX number, and you can offer
22 that list as a joint exhibit, beginning with 1, the
23 next would be 2, the next would be 3. We don't keep
24 coming back during trial and adding to the same JX. We
25 will do a new JX every time.

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1 It's not necessary to rename any of the
2 exhibits listed in a joint exhibit. The joint exhibit
3 may be offered first thing tomorrow. It doesn't have
4 to be prepared today, something you may agree on during
5 this next break. I don't want you thinking you have
6 got to rush and knock it out today.

7 If you wish to offer joint exhibits, including
8 any additional stipulations, again, they will be marked
9 JX, with the next number, 1, 2, or 3. I do believe I
10 saw a stipulation come in that would be JX 1, so your
11 next JX would be 2, but if that's not right, we will
12 get it straight on the record.

13 MS. MUSSER: Yes, Your Honor. Both parties
14 have agreed to JX 1.

15 JUDGE CHAPPELL: Okay. So I'll consider that
16 an offer to admit JX 1.

17 Any opposition?

18 MS. GOSWAMI: No opposition.

19 MR. MARRIOTT: No, Your Honor.

20 JUDGE CHAPPELL: JX 1 is admitted.

21 (Joint Exhibit Number 1 was admitted into
22 evidence.)

23 JUDGE CHAPPELL: This is important. Joint
24 exhibits shall not include a signature line for the
25 Judge. They are joint exhibits. I don't need to

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1 sanctify it by signing anything. They become part of
2 the record, and they're joint stipulations or joint
3 exhibits.

4 Now, after the break, we'll need to talk about
5 the exhibits the parties cannot agree upon. Hopefully
6 there will be none or very few of those. I expect the
7 parties to group these exhibits into categories. For
8 the party offering such exhibits, that party first will
9 offer its theory of admissibility for each category of
10 these exhibits. Then the party opposing opposition can
11 make its argument in opposition to each category of
12 exhibits. That way I'm not shifting the burden of
13 proof here.

14 The party offering it has got to tell me what
15 their theory of admissibility is. The party opposing
16 it gets to tell me why it's not allowed. Sometimes the
17 way this works is the burden of proof gets turned on
18 its head. We are not going to do that here.

19 If a document is not admitted at the final
20 prehearing conference or in the morning, the offering
21 party may re-urge admission of a document that was
22 excluded. Let's say, for example, you have a witness
23 who can demonstrate that the document is reliable,
24 admissible, and relevant, you meet the test for
25 admissibility, then you may re-urge admission of a

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1 document. I will say that happens extremely rarely,
2 but sometimes it does. Exhibits that are offered and
3 not admitted are part of the trial record, so no offer
4 of proof is needed. Don't waste everybody's time with
5 an offer of proof because something's excluded. We
6 don't need to do that.

7 Regarding providing the Judge or my staff with
8 exhibits, after the conclusion of this final prehearing
9 conference and after you complete the joint exhibit
10 listing all exhibits that have been admitted, you are
11 to provide an electronic version of all admitted
12 exhibits to my staff, OALJ. You can get in touch with
13 Dana Gross to work on the logistics. We do not need
14 hard-copy of those exhibits. This is not due today but
15 when you have it ready. Today it's more important to
16 meet and confer and knock out these objections.

17 I touched on this a little earlier. Let's talk
18 about joint stipulations. Under the scheduling order,
19 the parties were directed to meet and confer prior to
20 the prehearing conference regarding proposed
21 stipulations of law or fact, and I see you have already
22 done that. You started with that. That's a good
23 start, but that is by no means the last stipulation I
24 expect.

25 To the extent the parties are able to agree to

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1 stipulate to things like definitions, relevant time
2 frames, any noncontested facts, that will save us all a
3 lot of time when it's decision time and briefing time.
4 And I've already admitted JX 1, which was submitted
5 earlier, and, again, I say, keep in mind, the process
6 of agreeing to stipulations does not end today. It's
7 ongoing.

8 As we go along in the trial, the parties are
9 encouraged to continue to meet, confer, and agree on
10 additional stipulations that you may offer at any time
11 prior to filing post-trial briefs. And if this doesn't
12 happen during trial, I will re-emphasize this at the
13 end of trial.

14 Let's talk about some outstanding pretrial
15 motions. Most of these I have covered already today.
16 I've been talking for over an hour now, so we're going
17 to need a break soon. I usually have the witness and
18 the attorneys talk, so I've been going way too long
19 here, but let me wrap this up and we'll take a break.

20 I will not be ruling this afternoon on
21 Respondents' motion in limine to exclude the
22 investigational hearing testimony of Dr. David Spetzler
23 and any evidence of Caris Life Sciences, Inc., which is
24 opposed by the Government. I'm deferring ruling on
25 that at this time in light of the subpoena enforcement

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1 request now before the Commission. I, in fact, have
2 hopes that the people opposing that discovery will
3 concede now that it's going to a District Court. We'll
4 see what happens.

5 Here are my rulings on the remaining motions in
6 limine. Respondents filed a motion in limine to
7 exclude evidence of a fact witness' divorce
8 proceedings, contending that the evidence was not
9 relevant and any relevance was outweighed by prejudice.
10 Complaint Counsel opposed the motion, arguing that the
11 evidence does not reflect any divorce proceedings but a
12 separate issue and that the evidence is a matter of
13 public record and relevant to the fact witness'
14 credibility.

15 That motion in limine regarding the fact
16 witness' divorce proceedings is denied. This evidence
17 does not reflect their divorce proceedings, so the
18 title is a bit of a misnomer. PX 9225, which is the
19 subject of the motion, is a court decision, which is a
20 public document. The matters discussed in it,
21 therefore, are matters of public record. Also, I am
22 capable of assigning proper weight to any of this
23 evidence.

24 The Government filed a motion to exclude the
25 declaration and deposition transcript of George J.

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1 Serafin on the grounds that Serafin was not properly
2 designated as an expert witness and that no firsthand
3 knowledge -- and that he has no firsthand knowledge of
4 relevant facts. Respondents opposed the motion,
5 stating they don't intend to rely on Mr. Serafin, but
6 that his testimony is nevertheless relevant.

7 The Government's motion to exclude the
8 declaration and deposition transcript of George J.
9 Serafin is granted. The record shows that Mr. Serafin
10 was not properly designated as an expert witness and,
11 therefore, cannot properly offer expert opinions into
12 evidence. Furthermore, he cannot qualify as a fact
13 witness because he appears not to have any firsthand
14 knowledge of factual matters relevant to the case.

15 One last thing to cover before we take a break,
16 opening statements. Each side -- not each party --
17 each side is permitted to make an opening statement
18 that is no more than two hours in duration. Two hours
19 is a limit, not a goal. I'd like to hear from the
20 parties as to whether they feel they need the full two
21 hours or how much time they need. We will go with the
22 Government first.

23 MS. MUSSER: Your Honor, we ought to be able to
24 complete it in less than an hour.

25 JUDGE CHAPPELL: Thank you. Perhaps, if you

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1 are going to wear the mask, which is fine, I will ask
2 you to speak up.

3 Was that a yes?

4 MS. MUSSER: Will do, Your Honor. Yes.

5 JUDGE CHAPPELL: Thank you.

6 And Respondents, what kind of time do you think
7 you'll need?

8 MR. MARRIOTT: Your Honor, I anticipate for
9 Illumina requiring about an hour and 15 minutes, maybe
10 less --

11 JUDGE CHAPPELL: All right, and I do know --
12 I'm sorry. Go ahead.

13 MR. MARRIOTT: I'm sorry, Your Honor. Maybe
14 less, but I'm trying to not, you know, misstate it. So
15 hopefully less than an hour and 15 minutes.

16 JUDGE CHAPPELL: All right. And we do have
17 more than one Respondent, so will one attorney present
18 the opening statement for all or, if not, how do you
19 plan to divide up your time limit?

20 MR. MARRIOTT: Your Honor, I plan to speak for
21 Illumina, and I believe Mr. Pfeiffer plans to speak for
22 GRAIL, and I will let him speak for him himself.

23 MR. PFEIFFER: Yes, Your Honor, that is
24 correct, and I would believe for GRAIL, about a half an
25 hour.

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1 JUDGE CHAPPELL: So do I understand, then, that
2 Illumina is an hour and 15 and GRAIL is another 30
3 minutes?

4 MR. PFEIFFER: Yes, Your Honor.

5 JUDGE CHAPPELL: That will get us within the
6 two, all right.

7 We are going to take a break, and as I have
8 stated earlier, some moments ago, we will work -- I'm
9 sorry, you will work together on the issues, and I will
10 work to deal with any objections you have remaining.

11 I will give you an hour or so -- more time if
12 needed, less time if needed -- to work through these
13 objections. We will then reconvene and you will
14 provide me with an update. When you are ready to
15 reconvene, contact Dana Gross by email to inform us,
16 and we will restart the Zoom platform to continue the
17 final prehearing conference.

18 Anything further before we take a break?

19 MS. MUSSER: Not from Complaint Counsel, Your
20 Honor.

21 MR. MARRIOTT: Nothing here, Your Honor. Thank
22 you.

23 JUDGE CHAPPELL: All right. We are in recess
24 until I hear from the parties.

25 (A brief recess was taken.)

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1 JUDGE CHAPPELL: All right. Let's go back on
2 the record.

3 What's agreed to and what's not resolved? Who
4 wants to give me an update?

5 MS. MUSSER: Your Honor, Complaint Counsel can
6 give you an update.

7 JUDGE CHAPPELL: Are you the same person who
8 had a mask on earlier?

9 MS. MUSSER: I am. I kicked my colleagues out,
10 and I told them Judge Chappell made me, so
11 hopefully that --

12 JUDGE CHAPPELL: Not accurate, but it works,
13 so...

14 MS. MUSSER: Well, I will try to be more
15 accurate going forward.

16 After meeting with Respondents, Complaint
17 Counsel is withdrawing all objections except for
18 objections on four documents. We believe that we will
19 be able to resolve those issues and are working with
20 counsel for GRAIL to just get additional information
21 about the meta data to make sure those came from the
22 files of GRAIL employees.

23 So from our side, I think we've been able to
24 reach resolution on quite a bit. I will let
25 Respondents' counsel provide and update where they are

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1 on their pending objections, Your Honor.

2 MS. GOSWAMI: Thank you, Your Honor, and thank
3 you, Susan. This is Sharon Goswami for Respondents.
4 So we have also been able to drop a number of our
5 objections to admissibility. We have a few that we are
6 going to be standing on.

7 So we have objections based on relevance to
8 four documents. We have objections to expert reports
9 that Complaint Counsel is seeking to have admitted,
10 again, to four documents.

11 We're objecting on the basis of hearsay within
12 hearsay for I think around, you know, 20 or so emails
13 that are from the custodial files of the parties, and
14 we're also objecting on the basis of hearsay and lack
15 of foundation to about 40 documents.

16 JUDGE CHAPPELL: Are you speaking for both
17 Respondents?

18 MS. GOSWAMI: Yes, that's right.

19 JUDGE CHAPPELL: Let's deal with the same order
20 you used. What are the relevance objections?

21 MS. GOSWAMI: So the relevance objections
22 are -- there are four documents --

23 JUDGE CHAPPELL: Let me hear the offer first,
24 and then I will hear your objections.

25 MS. GOSWAMI: Sure.

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1 MS. MUSSER: All right. So for the relevance
2 objections, our understanding -- and we are still
3 waiting on Respondents' confirmation on precisely what
4 exhibits they're objecting to -- but our understanding
5 is they are all related to the Ariosa litigation, and,
6 Your Honor, you will hear about the Ariosa litigation
7 as Complaint Counsel presents evidence as an example of
8 the different levers that Illumina is able to pull to
9 disadvantage its downstream competitors.

10 So that litigation and the conduct between the
11 parties will be relevant to show that the -- that
12 the -- that Illumina has the same incentives in this
13 litigation and the same ability to disadvantage GRAIL's
14 customers here.

15 JUDGE CHAPPELL: All right. And so do you have
16 exhibit numbers of those you're objecting to?

17 MS. GOSWAMI: So I'm not sure -- actually, I
18 think I do. So we have -- we have PX 2240, which I
19 think we have -- we have three more, and I'm not sure I
20 have all of them in front of me, but we were planning
21 to give the full list when we revised the JX 2.

22 JUDGE CHAPPELL: And they're all the same
23 category or subject or type of documents as Complaint
24 Counsel just described regarding the other litigation?

25 MS. GOSWAMI: Yes, that's right. And, sorry,

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1 my apologies. It's PX 2240 through PX 2243.

2 JUDGE CHAPPELL: All right. Let me hear your
3 objection other than relevance. What about relevance?
4 Why are they not relevant?

5 MS. GOSWAMI: Right. So as Complaint Counsel
6 just said, they appear to be arguing that these are
7 relevant to NIPT and the levers that Illumina can
8 allegedly pull, but, unfortunately, the documents don't
9 actually go to any of that, because these are documents
10 where Ariosa made certain complaints, and there was a
11 litigation between Illumina and Ariosa where the Court
12 found against Ariosa, and so none of those complaints
13 that Ariosa was making was found to be valid. So it
14 actually doesn't have the relevance that Complaint
15 Counsel contends that they do.

16 JUDGE CHAPPELL: Any response?

17 MS. MUSSER: Yes, Your Honor. We're -- our
18 response is first that Ariosa had to go to court and
19 felt compelled to go to court due to the conduct of
20 Illumina, and regardless of the outcome of it, the
21 complaints alleged within that litigation, it's our
22 position that is extremely relevant, and also the
23 course of the litigation and the time and the cost of
24 having to raise that dispute when there was a
25 disagreement as to Illumina's behavior also, of course,

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1 is relevant to the ability of the open offer to be an
2 effective source of relief if you have to litigate with
3 Illumina in order to reach resolution on particular
4 claims. So the fact of the litigation in our mind is
5 the relevance of the litigation, not the end result.

6 JUDGE CHAPPELL: All right. Based on the
7 representations she made, these exhibits are admitted.
8 Your objection is overruled, but they are admitted for
9 the limited purpose that she just described to us, and
10 you, of course, are free to counter that with the
11 points that you just made to me.

12 MS. GOSWAMI: Okay. Thank you, Your Honor.

13 JUDGE CHAPPELL: Next?

14 MS. MUSSER: The second category of reports are
15 expert reports. Under Rule 3.43(b), expert reports
16 come in unless there is some indicia of unreliability.
17 Here --

18 JUDGE CHAPPELL: Hang on. Go to exactly what
19 she objected to, not the reports themselves, but I
20 think email contained in the reports. Am I correct?

21 MS. GOSWAMI: No, we're -- so that's a separate
22 objection, Your Honor. So we are objecting to the
23 reports themselves, and then there's a separate
24 objection about emails that are hearsay within hearsay.

25 JUDGE CHAPPELL: Okay. Expert reports are

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1 admissible. That's overruled.

2 What's your next objection?

3 MS. GOSWAMI: Susan, I don't know if you're on
4 mute, because I can't hear you anymore.

5 MS. MUSSER: I was the first one to do it. My
6 apologies, Your Honor and Ms. Goswami.

7 The second category of objections are certain
8 emails between lower level employees --

9 JUDGE CHAPPELL: Let me say this. It's very
10 rare that the properties don't just agree to allow
11 expert reports rather than objecting to them, and was
12 there an attempt to at least agree to admit expert
13 reports here by both sides?

14 MS. MUSSER: Your Honor, Complaint Counsel's
15 position, other than its motion in limine, other than
16 those two, were that the reports should come in and had
17 no objection to Respondent.

18 JUDGE CHAPPELL: From Respondent?

19 MS. GOSWAMI: So in our view, because the --
20 while we understand that there may be a certain
21 practice of expert reports, you know, being admissible
22 in these proceedings, under the Federal Rules of
23 Evidence, expert reports are not evidence, and,
24 therefore, in our view, they are not admissible.

25 JUDGE CHAPPELL: Well, I'm not saying they're

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1 going to prove any point in dispute. I'm just saying
2 they're admitted into evidence. I'm not saying what
3 weight they're going to have.

4 MS. GOSWAMI: Right. And I think where we are
5 respectfully, Your Honor, is that, you know, regardless
6 of whether it comes in now and the weight that Your
7 Honor gives to them, there is -- it remains that
8 there's a record that goes up on appeal, and what the
9 appellate court will see is that, you know, they were
10 admitted --

11 JUDGE CHAPPELL: But they also will see that
12 you have objected to them and you have reserved your
13 objection on appeal.

14 MS. GOSWAMI: Understood, Your Honor, and
15 that's actually precisely why we are objecting to them.

16 JUDGE CHAPPELL: That's fine.

17 Okay, where were we?

18 MS. MUSSER: The third category of documents
19 are Illumina and GRAIL documents with lower level
20 employees. Our understanding of the basis for the
21 objection is that --

22 JUDGE CHAPPELL: Well, let me also clarify what
23 I was saying, that expert reports may come in, but that
24 clearly doesn't mean the opinions will be accepted for
25 what they purport to say. It does not mean that at

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1 all. It just means they're being admitted, not that
2 they're conclusive to anything.

3 Go ahead.

4 MS. MUSSER: Understood, Your Honor.

5 So the third category of documents are Illumina
6 and GRAIL documents from lower level employees. Our
7 understanding is that Respondents are objecting to
8 those as hearsay. Complaint Counsel's position is that
9 hearsay alone, under the Part 3 rules, Rule 3.43(b),
10 isn't a basis for excluding those from evidence, and
11 moreover, these documents came from Illumina and
12 GRAIL's files, and there's no indication that they are
13 in any way unreliable. As such, we believe that these
14 should be admitted into evidence.

15 JUDGE CHAPPELL: What's your objection?

16 MS. GOSWAMI: So we actually object both on
17 hearsay and on foundation grounds. So these are emails
18 that are from employees who were not deposed in this
19 proceeding. They are not going to be presenting trial
20 testimony in this proceeding. The Complaint Counsel
21 has not, through deposition testimony, laid any grounds
22 for any kind of hearsay objection, you know, that
23 there's a -- they're a business record or some other
24 hearsay objection. And so we feel that Complaint
25 Counsel just has not met their burden to show both the

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1 foundation and that this overcomes hearsay.

2 JUDGE CHAPPELL: Well, based on her
3 representation that they are, number one, statements or
4 emails from employees of a party, number one, and
5 number two, they come from the files of the
6 Respondents, there's something called the Lenox rule --
7 L-E-N-O-X -- 3.43(d), as in delta. Based on those
8 records, these objections are overruled.

9 Next.

10 MS. MUSSER: And the third category is hearsay
11 within hearsay. Our understanding is that Respondents
12 are objecting to 20 documents based on this ground.
13 Again, these documents are Illumina/GRAIL documents,
14 and hearsay alone isn't a basis for excluding those
15 from evidence under the Part 3 rules. As such, it is
16 Complaint Counsel's position that these should be
17 entered into evidence.

18 JUDGE CHAPPELL: Okay, go ahead.

19 MS. GOSWAMI: So these documents are emails
20 where, you know, either the author is, you know,
21 reproducing, you know, some notes from a conversation
22 that is -- that was had that they're putting into the
23 email. They may be reproducing, you know, interview
24 notes, and, again, that's something that they're just
25 offering that for the truth of the matter asserted,

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1 what those notes show, and that's improper hearsay
2 within hearsay.

3 JUDGE CHAPPELL: Response?

4 MS. MUSSER: Your Honor, first, we don't -- I
5 think that's a document-by-document -- we don't know
6 precisely what document Ms. Goswami is referring to,
7 but generally, the overall document, the kind of frame
8 document clearly fits within a business record
9 exception of hearsay.

10 Moreover, it's reliable, and to the extent that
11 there are any hearsay objections to statements within
12 those, those would go to the weight of the evidence,
13 not the admissibility, and, thus, our position is those
14 should be admitted.

15 JUDGE CHAPPELL: Am I correct that these are
16 all emails that -- or at least part of emails -- all of
17 these emails generate from the parties?

18 MS. MUSSER: Your Honor, we are still waiting
19 on Respondents to identify particularly what objections
20 they're standing on, so I can't make that
21 representation.

22 JUDGE CHAPPELL: Well, let me make this ruling.
23 Emails from the parties are going to be admissible. To
24 the extent there are statements within the emails that
25 are, let's say, repeated from someone else, that

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1 doesn't mean they're going to be relied upon. Anything
2 like that that's not covered in context or put in
3 context by a witness and not demonstrated to be why
4 it's reliable, it doesn't -- it's not going to prove
5 any point. So you're welcome to attack anything like
6 that. I'll just say that if document RX 507 or PX 507
7 is admitted, and you see it in a post-trial brief
8 purporting to make some point, and you realize nobody
9 talked about it, there is no connection to anything,
10 it's not a very strong point, and you can attack that
11 in your post-trial brief.

12 So I'm allowing their use by the parties. That
13 does not mean they are going to be conclusive to prove
14 the truth of the matter of anything included in them.
15 So those are going to be admitted.

16 MS. GOSWAMI: Thank you, Your Honor.

17 JUDGE CHAPPELL: Anything else?

18 MS. MUSSER: No, Your Honor. The parties will
19 work to get you a JX list, ideally tonight, but it may
20 be tomorrow morning if that schedule works for Your
21 Honor.

22 JUDGE CHAPPELL: And to make the record clear,
23 I think you should work together and come up with a
24 list of all the exhibits that were objected to that
25 were -- and the objections were overruled and they were

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Illumina, Inc. and Grail, Inc.

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1 admitted, just so our record is clear. I did it very
2 informally because I thought we could handle it that
3 way. Is anybody in doubt on my ruling so far?
4 Everybody understand?

5 MS. GOSWAMI: No, Your Honor.

6 MS. MUSSER: I understand. I'm not speaking
7 for any others other than Complaint Counsel.

8 JUDGE CHAPPELL: In fact, a lot of the rules
9 that we abide by were -- let's just say the rules were
10 changed after I came to the Federal Trade Commission
11 because of rulings I continually made applying Federal
12 Rule of Evidence. That's all I'll say about that. But
13 just remember, there's no jury. It's a bench trial.

14 Is there anything else before I conclude the
15 final prehearing conference?

16 MS. MUSSER: Not from Complaint Counsel, Your
17 Honor.

18 MR. MARRIOTT: Nothing here, Your Honor. Thank
19 you. It's been very helpful.

20 JUDGE CHAPPELL: GRAIL? I'm sorry, I heard
21 from -- that's Illumina, right? Have I heard from
22 GRAIL? I don't see GRAIL.

23 MR. STARK: Sorry, Your Honor. I wasn't
24 intending to speak since I was off camera. Nothing
25 further from us. Thank you, Your Honor.

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1 JUDGE CHAPPELL: Hearing nothing further, we
2 will begin tomorrow at 10:00 a.m. with opening
3 statements. I thank everyone for your attention. And
4 with that, we are adjourned.

5 MS. MUSSER: Thank you, Your Honor.

6 MR. MARRIOTT: Thank you, all.

7 MS. GOSWAMI: Thank you.

8 (Whereupon, at 4:38 p.m., the hearing was
9 adjourned.)

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Final Pretrial Hearing
Illumina. Inc. and Grail, Inc.

8/23/2021

1 CERTIFICATE OF REPORTER

2

3

4 I, Susanne Bergling, do hereby certify that the
5 foregoing proceedings were recorded by me via stenotype
6 and reduced to typewriting under my supervision; that I
7 am neither counsel for, related to, nor employed by any
8 of the parties to the action in which these proceedings
9 were transcribed; and further, that I am not a relative
10 or employee of any attorney or counsel employed by the
11 parties hereto, nor financially or otherwise interested
12 in the outcome of the action.

13

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15

16

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18

SUSANNE BERGLING, RMR-CRR-CLR

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Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL TRADE COMMISSION et al.,
Plaintiffs,

v.

THOMAS JEFFERSON UNIVERSITY et
al.,

Defendants.

CIVIL ACTION
NO. 20-01113

ORDER

AND NOW, this 8th day of December, 2020, it is **ORDERED** that the exhibits listed in Exhibits A and B to ECF 274 and in Appendix A to ECF 275 are **ADMITTED**.

It is **FURTHER ORDERED** that the motions at ECF 129, 130, 173, 218, 257, 265 and 267 are **DENIED**. The motion at ECF 163 is **GRANTED** to the extent that it seeks to keep PX1074, PX1261, PX1310, PX1365, PX1395, PX1404, PX6049, DX9372 and DX 9438 under seal, *see* (ECF 232), and is **DENIED** in all other respects.¹

¹ “It is well-settled that there exists, in both criminal and civil cases, a common law public right of access to judicial proceedings and records.” *Littlejohn v. BIC Corp.*, 851 F.2d 673, 677-78 (3d Cir. 1988). “The ‘strong presumption of openness does not permit the routine closing of judicial records to the public.’” *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (quoting *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994)). Parties “seeking to seal any part of a judicial record bear[] the heavy burden of showing that ‘the material is the kind of information that courts will protect’ and that ‘disclosure will work a clearly defined and serious injury to the party seeking closure.’” *Miller*, 16 F.3d at 551 (quoting *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984)). “Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient.” *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001) (internal citation omitted).

The Court has reviewed all documents and materials received from the parties in this litigation and previously placed certain documents under seal. *See* (ECF 232.) Parties and third parties seeking to seal any other documents have not met their burden to show that disclosure will work the kind of clearly defined and serious injury that a sealing order is intended to protect and have not rebutted the strong presumption of openness. In addition, to the extent that parties and third parties seek to seal information because it has been designated as “confidential” or “highly

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

confidential” in accordance with the terms of the parties’ Stipulated Protected Order (ECF 55), the Court finds that disclosure of this information is in the interest of justice. *See* (ECF 55 at ¶ 19.)

Exhibit D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, .
 .
Plaintiff, . CA No. 18-0414 (TSC)
 .
v. .
 . Washington, D.C.
WILHELM WILHELMSSEN, et al., . Tuesday, May 29, 2018
 . 9:50 a.m.
Defendants. .
. Pages 1 through 134

DAY 1
TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE TANYA S. CHUTKAN
UNITED STATES DISTRICT JUDGE

<p><u>For Plaintiff:</u></p> <p>Federal Trade Commission</p>	<p>THOMAS J. DILLICKRATH, ESQ. LLEWELLYN O. DAVIS, ESQ. U.S. Federal Trade Commission Bureau of Competition 400 Seventh Street, SW Washington, DC 20024 (202) 326-3286</p>
<p><u>For Defendants:</u></p> <p>Wilhelmsen Maritime Wilhelmsen Holding</p>	<p>COREY W. ROUSH, ESQ. CATHERINE FAIRLEY SPILLMAN, ESQ. Akin Gump Strauss Hauer & Feld LLP 1333 New Hampshire Avenue, NW Washington, DC 20036 (202) 887-4000</p>
<p>Drew Marine Group Resolute Fund II</p>	<p>MARK W. RYAN, ESQ. MICHAEL E. LACKEY, JR., ESQ. Mayer Brown LLP 1999 K Street, NW Washington, DC 20006 (202) 263-3000</p>
<p><u>Court Reporter:</u></p>	<p>BRYAN A. WAYNE, RPR, CRR U.S. Courthouse, Room 4704-A 333 Constitution Avenue, NW Washington, DC 20001 (202) 354-3186</p>

C O N T E N T S

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TESTIMONY

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P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, we have civil action 18-414, Federal Trade Commission versus Wilhelmsen Maritime Services, et al.

I would ask that counsel please approach the lectern, identify yourselves and those at your respective tables, please, starting with the plaintiff.

MR. DILLICKRATH: Good morning again, Your Honor. Tom Dillickrath on behalf of the Federal Trade Commission. I'm joined at counsel table today by my colleagues, James Rhilinger, Christopher Caputo, Josh Goodman, Amy Dobrzynski and Llewellyn Davis, along with our honors paralegal, Catherine Wayne.

THE COURT: Hello.

MR. ROUSH: Good morning, Your Honor. Corey Roush from Akin Gump on behalf of the Wilhelmsen defendants. At counsel table, I have with me Fairley Spillman and Catherine O'Connor. And I'd also like to introduce -- we have our corporate rep in the room, Jon Bjornvold, Your Honor.

THE COURT: Good morning. Akin Gump is busy. I think I have you all in a hearing before me at 2:30 as well.

MR. ROUSH: Not this team, but yes, Your Honor.

THE COURT: No, not this team.

MR. RYAN: Good morning, Your Honor. Mark Ryan on behalf of the Drew Marine defendants. And with me at counsel table are Oral Pottinger and Michael Lackey. And in the

1 courtroom today as our corporate representative is the president
2 and CEO of Drew Marine, David Knowles.

3 THE COURT: Good morning. All right. Thank you all.
4 Sorry I was a bit late.

5 Let's just take care of a couple of housekeeping matters.
6 I know we're all trying to get the evidence in and move this
7 along in an expedited fashion. And when we were planning for
8 this, I -- as you know, I have a committee meeting in Pittsburgh
9 next week, and I thought that I would be leaving earlier.
10 Anyway, some hours opened up. Not full days, but half days.
11 And if you all -- I know you have to plan witnesses and your
12 schedule, but if you all want to take the time, we can.

13 So Monday, which is June 4, I do not -- my flight is at
14 5:15 from Reagan, so I have -- probably have a hard stop by
15 3:00-ish, 2:30, to be certain, with rush hour. But the entire
16 morning is available. So if you all wanted to start at 9:00 and
17 go till 2:30 -- I don't know if you have witnesses here or not,
18 but I am here and I don't have anything scheduled.

19 Mr. Dillickrath and Mr. Roush, Mr. Ryan?

20 MR. DILLICKRATH: Your Honor, we'll have to check on
21 witness availability, but if our witnesses can be available,
22 we're happy to --

23 THE COURT: Okay. That's why I wanted to let you know
24 today so you can -- you don't have to let me know today or -- I
25 mean, I'm not going to schedule anything. The day will stay the

1 way it is, so -- believe me, if we don't sit, I have a ton of
2 stuff --

3 MR. DILLICKRATH: That's fair, Your Honor.

4 THE COURT: -- that I'm carrying that I can do.

5 MR. ROUSH: And for defense case, several of our
6 witnesses are coming from overseas.

7 THE COURT: Okay.

8 MR. ROUSH: And so if plaintiffs are still going, we
9 would have no objection to that, but we would want to start our
10 case on June 8th if they've concluded theirs.

11 THE COURT: Okay. That's fine. I am just letting you
12 know that that time is available if you all need to use it.

13 Also, I return -- I thought I was coming back on the 7th,
14 but I'm actually coming back on the evening of the 6th, which is
15 Wednesday. So currently we're scheduled to resume on the
16 Friday. I have one very brief matter on the Thursday and one
17 that may or may not turn into a plea. But also I have a chunk
18 of time that day as well, probably all afternoon, if you all
19 need it. So just letting you know as well.

20 Again, if your schedule -- if you've already set your
21 schedule and your witness lists and you can't use the time,
22 that's perfectly fine. As I said, I have a ton of stuff that I
23 can get done. But that's also available.

24 All right. Also, I know I said that we'll be starting at
25 9:30, but on some day -- I can actually start at 9:00 most days.

1 Maybe what I'll do is tell you the -- you know, at the beginning
2 of the week. For example, I can start -- I can start tomorrow
3 at 9:00, if you want. Now, if you've already set up your whole
4 team to be ready for 9:30, that's fine. But I can start
5 tomorrow -- actually, for the rest of the week except Friday.
6 So Wednesday and Thursday I can start at 9:00. I have a 9:00
7 meeting on Friday. So it's up to you. Let me know what you
8 want to do at the end of the day.

9 All right. That's all the housekeeping we have -- I have.

10 MR. DILLICKRATH: Your Honor, I think -- one small
11 item?

12 THE COURT: Yes.

13 MR. DILLICKRATH: And this is with regard to exhibits.
14 We mentioned the other day that we would like to move all the
15 exhibits in en masse before the start of the hearing.

16 THE COURT: All right.

17 MR. DILLICKRATH: We sent over our sealed exhibit list
18 last night. There are a very small number of documents over
19 which we still are -- have objections on both sides. We have
20 agreed amongst ourselves -- and Mr. Roush, if I get in wrong,
21 feel free to jump in. We've agreed amongst ourselves that we
22 don't need to argue those at this point.

23 THE COURT: Okay.

24 MR. DILLICKRATH: If they come up during the course of
25 the hearing, we'll ask Your Honor to rule on those. Otherwise,

1 we think we can reserve any argument on those. And what we
2 would like to do is move in all approximately 3,000 exhibits
3 into the record at this time.

4 THE COURT: All right. They -- and, Mr. Roush, is
5 this a joint motion?

6 MR. ROUSH: Yes, Your Honor it is.

7 THE COURT: All right. They will be admitted into
8 evidence --

9 MR. DILLICKRATH: Thank you, Your Honor.

10 THE COURT: -- except for those for which the parties
11 object if they're offered during the course of the hearing.

12 MR. DILLICKRATH: Thank you.

13 THE COURT: And I want to tell you that I apologize
14 for all the trees that may have been murdered as part of this
15 case, because when my courtroom deputy told you I needed two
16 copies, he had no idea -- actually, I should have told him,
17 because I had an idea; we did not communicate -- of the volume
18 of documents we were talking about. So I apologize for that.
19 Electronic is fine. I don't think there's room in my jury room
20 for all those boxes. So I hope you didn't go to too much
21 trouble and expense.

22 But, I mean, certainly, if I have the hard copies I can
23 look at them as we go along.

24 All right. Mr. Dillickrath?

25 MR. DILLICKRATH: Your Honor, my colleague has hard

1 copies. If you would like one, he could approach.

2 (Documents tendered to the Court.)

3 OPENING STATEMENT BY COUNSEL FOR PLAINTIFF

4 MR. DILLICKRATH: Thank you, Your Honor, may it please
5 the Court, Tom Dillickrath again, here on behalf of plaintiff,
6 the Federal Trade Commission.

7 Your Honor, what we have here today is, in essence, a very
8 simple case. And what I'd like to do this morning -- and this
9 is what we'll do throughout the course of the hearing -- is to
10 focus the Court's attention on the issues that are really at the
11 core of this matter. Here's what the FTC will demonstrate
12 during this hearing.

13 Wilhelmsen and Drew are the two largest competitors in the
14 world for the supply of marine water treatment products and
15 services, and they sell these products to a number of customers,
16 including owners and operators of global fleets, which are large
17 vessels that travel around the globe. For these customers,
18 there are two, and only two, credible choices to supply the
19 marine water treatment products and services, and that's the
20 defendants, Wilhelmsen and Drew.

21 And what Wilhelmsen is doing in buying Drew is executing on
22 a strategy that it's had in place for a few years now, which is
23 to take out its largest competitor. And the effect of this
24 transaction would be to raise price and lower quality.

25 Now, there's a straightforward way to think about this,

1 Your Honor. First, the evidence will show that this is an
2 illegal merger of the two dominant firms in the market, indeed,
3 the only two firms that most customers consider when bidding out
4 on their requests. And there are time-tested, well-established
5 ways used by the antitrust agencies and endorsed by the courts
6 to think, from an economic standpoint -- widely accepted ways to
7 analyze a merger's impact on competition, and using that
8 framework, we'll explain why this merger is presumptively
9 illegal.

10 Now, that's part of a burden-shifting framework. There's a
11 rebuttable presumption -- and defendants will have the chance to
12 show that the presumption is not applicable here. But on these
13 facts, Your Honor, and for the reasons that we'll discuss, the
14 defendants cannot even begin to move the needle, let alone
15 approach the threshold -- and it is a very high threshold --
16 that they would need to rebut the presumption.

17 And there is plenty of other evidence, Your Honor --
18 ordinary course business documents from the defendants, from
19 Clare Consultants, evidence from customers, from competitors,
20 and even from some entities that are outside of the market --
21 that will explain beyond any presumption why this merger is
22 indeed illegal.

23 And with that framework in mind, we ask the Court to apply
24 section 13(b) of the FTC Act, given the presumptive illegality
25 of the merger and the other evidence from every level of

1 industry participant, and preserve competition by enjoining the
2 merger until resolution of the administrative complaint
3 following the full hearing on the merits which is scheduled to
4 start in just a couple of months -- less than two months.

5 So why are we here, Your Honor? And I'd like to start by
6 talking about the process. Now, the FTC investigates many
7 mergers every year, and only challenges a small fraction of
8 those. And the reason the FTC challenges mergers is to fulfill
9 its mission, which is to protect consumers in the U.S., and
10 ultimately, in this case, across the globe.

11 Here, Your Honor, industry participants initially expressed
12 concerns to the FTC, and you'll hear some of those concerns over
13 the next few weeks, concerns that are consistent with the other
14 evidence that we've gathered during our investigation.

15 And it's also worth noting that the two foreign competition
16 agencies that have looked at this merger, the UK and the
17 Singapore competition authorities, have found that the merger
18 was anticompetitive. And in fact, Singapore just released its
19 preliminary decision -- or issued a press release on its
20 preliminary decision, to be specific -- last Friday. And they
21 found a significant problem in a very similar product market to
22 that we are looking at today.

23 Now, Your Honor, I want to talk briefly about the process
24 that gets us to a complaint, because this is not something the
25 FTC takes lightly. The FTC goes through a rigorous process, a

1 rigorous investigation, including interviews with the parties
2 and a full panoply of industry participants, and that includes
3 investigational hearings, which are essentially depositions.
4 Parties have an opportunity to present their views on the case
5 in meetings at all levels of the FTC, from the staff, to
6 management, to the commissioners themselves. And the defendants
7 took full advantage of those opportunities.

8 We also do economic work to see what the market looks like.
9 And all that took place here in this case, Your Honor. The
10 investigation was exhaustive. And all sorts of industry
11 participants, or even folks that defendants suggested might one
12 day might want to be in the market, gave us information. And
13 only then, after this exhaustive process, was a recommendation
14 made on whether to block this merger, whether that was necessary
15 to protect existing competition here in the market for marine
16 water treatment chemical products and services.

17 The Commission ultimately votes on whether to issue a
18 complain, and that is not a rubber stamp process by any means,
19 Your Honor. But if they do vote to issue a complaint, it starts
20 the clock ticking on the administrative hearing which has to
21 take place within 210 days.

22 And our overarching goal, Your Honor, is to protect the
23 loss of competition and the effects on consumers that may result
24 from this loss. And that is why, with the onset of the
25 administrative hearing fast approaching, we ask the Court only

1 to maintain the status quo until the decision on the merits.

2 Now, the parties may say, we prefer to just litigate the
3 preliminary injunction and we may appeal that but we'll never go
4 through the administrative proceeding. But there is a process
5 that is put into place by Congress for them to have their chance
6 for a full hearing, to have their day in court. And whether
7 they elect to do so or not, they cannot selectively opt out and
8 transform this hearing into a quasi-permanent injunction
9 hearing.

10 The relief we seek here is limited, and if defendants do
11 not want to take advantage of their right to a full hearing
12 before the administrative law judge, that's up to them, but it
13 does affect the standard that should be applied here.

14 So at the threshold, Your Honor, we're here to protect
15 consumers, but why this case? Why did this one pass muster
16 where so many others did not? Why are we taking action here
17 before this Court?

18 Well, first, Your Honor, the defendants are the only truly
19 global suppliers of marine water treatment chemical products and
20 services. Now, you'll hear differently from defendants.
21 They'll tell you about other loose, informal networks that they
22 claim are capable of making some sales into various ports, and
23 they'll describe them as global. They'll also tell you about
24 much smaller regional competitors who claim to be the same size
25 and scope as defendants on their websites.

1 But the facts that we'll present here at this hearing will
2 show that they are not and that customers know very well that
3 they are not. Now, in fact, if this illegal merger were to be
4 consummated, the next largest competitor would be 15 to 20 times
5 smaller than Wilhelmsen and, in fact, even now, it's just a
6 fraction of the size of either defendant. And that just isn't
7 consistent with the tale that defendants weave of a competitive
8 market post-merger.

9 Now, you'll hear over the next few weeks from a number of
10 customers, and they will tell you -- and you'll see in the
11 documents as well, Your Honor -- global fleets' customers need a
12 global distribution network, they need a breadth of product
13 offering, they need service and technical offerings, and they
14 need a supplier with a reputation and who can guarantee product
15 consistency. And you'll hear that the entities who are best
16 positioned to do so are defendants.

17 And along those lines, Your Honor, defendants will tell you
18 that entry or expansion is easy, that there are no barriers to
19 entry. But that is just not consistent with the facts. And
20 indeed, defendants' idea of what the market will look like
21 post-merger is purely speculative.

22 Defendants also will talk about the efficiencies associated
23 with the merger, and, Your Honor, it's up to the defendants to
24 show that any efficiencies are cognizable. And the efficiencies
25 they claim here do not pass that test. But we'll talk more

1 about that in a few moments.

2 Now, Your Honor, I don't want to put the cart ahead of the
3 horse too much, but it's worth noting the market shares of these
4 defendants as opposed to everyone else in the market. And if
5 you look at the two shades of blue, those are Wilhelmsen in the
6 dark blue at about 46 percent, and Drew at 39 percent in the
7 lighter blue. And you put that forward to post-merger and
8 you're at about 85 percent, and that's for, Your Honor, I should
9 say, all water treatment chemicals. Many of the smaller
10 providers don't track it at the same level as our relevant
11 market, which consists of boiler water and engine cooling water
12 chemicals. But the numbers are directionally the same, and
13 indeed, this is probably a conservative estimate.

14 And this just shows you where the defendants face an
15 insuperable battle here because they cannot ignore this dominant
16 share that Wilhelmsen and Drew possess now, and even more
17 colossal share that they'll possess post-merger.

18 Now, Your Honor, I'd just like to speak briefly about each
19 of the defendants. Wilhelmsen is a publicly traded Norwegian
20 company, 125 countries that they operate in, 4500 employees,
21 very substantial revenues, 182 warehouse locations, all of which
22 are very impressive statistics. And I don't mind saying,
23 Your Honor, I think Wilhelmsen is a very impressive company.
24 They are the largest maritime services company in the world
25 probably because they focused on providing high-quality

1 products, reliable products, and -- this is very important to
2 purchasers -- a truly global network.

3 And the way that Wilhelmsen has been able to get into the
4 marine water treatment chemicals is historically through
5 acquisition. In 2005 they bought a company called Unitor, and a
6 press release issued at the time by one of the senior executives
7 said that release -- or that acquisition, excuse me, was to
8 create a unique global network.

9 Now, in 2011 they bought a company called Nalfleet which is
10 the marine chemicals division of a company called Nalco, which
11 is now Ecolab. And I apologize, Your Honor. It's like a
12 complicated Russian novel with all the names. I'm very sorry.
13 I'll try not to do too much of that. But you'll learn that
14 Ecolab and other industrial suppliers have no interest in being
15 involved in this business.

16 Now, in 2018, Wilhelmsen wants to buy Drew. And why? In
17 this acquisition, they want to acquire the only remaining
18 competitor, which would give them this dominant position in the
19 market. And they've been trying to make this acquisition for
20 four years with the single goal of acquiring their only truly
21 significant competitor.

22 Now, Drew is also a very impressive company, Your Honor. I
23 would not deny that. They tout their ability to provide
24 comprehensive global coverage, and they've been doing that for
25 about 90 years. They focus on selling water treatment programs,

1 as they call them, which are comprehensive solutions involving
2 chemicals and services and testing equipment and dosing
3 equipment.

4 And indeed, Your Honor, they also have over 400 employees,
5 I believe, they operate in 45 or 46 countries, over 80
6 distribution centers. And they've built quite a reputation for
7 themselves for their technical capabilities. And, really, it's
8 right in the name: Drew Marine Technical Services. Technical
9 services are a very important part of their business model, as
10 it is for Wilhelmsen.

11 Now, before we get too deeply into the antitrust issues,
12 Your Honor, I just want to spend a couple of minutes talking at
13 a very high level about what it is -- what are the products and
14 services that defendants supply.

15 Now, the supply of marine water treatment chemical products
16 and services includes the provision of chemicals, testing
17 equipment, related technical services, like shipboard services,
18 the ability to put an engineer actually on the ship, and
19 training, which are all sold as part of a holistic program or a
20 solution.

21 And what do these chemicals do? Well, Your Honor, we focus
22 here on two different components of marine water treatment
23 chemicals, which are boiler water treatment and engine cooling
24 water treatment. And in very general terms -- and we'll have
25 witnesses who can tell you in far greater detail than I -- but

1 they're designed to inhibit corrosion or prevent scaling in
2 these engines and boilers.

3 And why is this important? Well, if the water in these
4 engines and boilers isn't maintained properly, you can have
5 engine failure or boiler failure, and that can be catastrophic.
6 It can leave a ship dead in the water, it can leave it
7 inoperable, and that results in repair costs and down time,
8 which are anathema to these operators. They need to have those
9 ships out traveling from port to port.

10 Now, as a proportion of a fleet owner's spend, or
11 operator's spend, these chemicals are not very expensive; they
12 are relatively low cost. But their cost is disproportionate to
13 their significance. You could describe them as low cost but
14 very high criticality items. And we'll talk a little bit more
15 in a few minutes about the product definition that includes
16 global fleets, but I just want to give some context on what the
17 vessels are we're talking about.

18 These are very large ships. They can be tankers which
19 carry chemicals or oil or gases in bulk. They can be military
20 vessels, like the ships operated by Military Sealift Command,
21 which is the civilian transportation arm of the Department of
22 Defense, and is Drew's most important customer. Or it can be
23 bulk carriers which can transport virtually any type of cargo.
24 And these are very large ships, as measured in gross tons.

25 And the main takeaway here, Your Honor, is the interplay

1 between global fleets and these marine water treatment chemical
2 products, and that is global fleet customers will seek a
3 consistent product everywhere they travel, and that can be quite
4 unpredictable. They often don't know where the next port is
5 going to be. And what you'll hear is that customers do not and
6 cannot mix and match products on a port-by-port basis.

7 And just to give a sense of how these vessels travel,
8 Your Honor, and I'll just touch briefly on this hypothetical
9 vessel which starts out in Miami with a load of water treatment
10 chemicals. It travels for about three months -- and typically
11 they carry about three months' worth of these chemicals on
12 board -- and ends up in Shanghai. So in Shanghai, they restock
13 the chemicals, and they have a new second engineer who has just
14 come onto the ship. And this second engineer is not familiar
15 with how to test the products. And second engineer is actually
16 a relatively high-ranking status on the ship. So the company
17 may want a representative from Drew or Wilhelmsen to come on
18 board and train that second engineer in how to do the testing.

19 They continue to travel on. Their next scheduled stop is
20 in Cape Town, where they take another load of marine water
21 treatment chemicals. At this point, they plan to sail back to
22 San Francisco, but they have an unexpected pit stop -- and these
23 happen all the time -- in Rio de Janeiro. And while they are in
24 Rio, they say, well, we've had a problem. We can't get the
25 testing consistent. There are anomalous number. We need to

1 have a representative of one of these companies come on board.
2 And they need to know that when they do this unexpected portage
3 in Rio, that they can get somebody on board who can help them
4 with the problems they've encountered.

5 Now, I spoke a little bit earlier about market shares. And
6 there's no doubt, Your Honor, that the market shares here are
7 extremely high and raise serious antitrust concerns. And I
8 could literally cite to dozens of documents, if not hundreds of
9 documents, Your Honor, where the defendants talk about each
10 other as meaningful competition. And I just highlighted a
11 couple here. The first document was a Wilhelmsen pricing
12 optimization product, and Wilhelmsen talks about their key
13 global competitor. And who is that? It's Drew.

14 And the defendants have described the competition between
15 each other as fierce and aggressive. And those documents come
16 from very senior executives at Drew. And with that in mind,
17 this merger would only eliminate that fierce and aggressive
18 competition between these two key global competitors.

19 And when you have a situation like this, with the number
20 one entity in the market acquiring the number two, which is the
21 case with Wilhelmsen acquiring Drew, there's a pretty clear
22 framework -- and I only put this slide up to highlight what
23 Judge Sullivan said in *Staples* -- there can be little doubt that
24 the acquisition of the second largest firm by the largest will
25 tend to harm competition in that market.

1 Now, if I could ask Mr. Bradley to black out the public
2 screens for the next slide. And, Counsel, if you could -- thank
3 you.

4 And just to see how dominant the defendants are,
5 Your Honor, I'd like you to just look at this revenue data
6 that's on your screen for marine water treatment chemicals. And
7 again, this data is at an aggregated level because that's how
8 most of the small competitors keep track. But it is, if
9 anything, a conservative assumption.

10 And if you look at Wilhelmsen and Drew and compare them
11 with the next largest competitor, it's just an incredible
12 difference. If my maths are right, Drew is about eight times
13 larger than the next largest competitor, Marichem. And even if
14 I took all of these other small competitors along the right,
15 Your Honor, and I stacked them on top of the Marichem bar, it
16 still would be less than half of the revenues of Drew.

17 Mr. Bradley, you can turn the access back on.

18 And just a couple of documents to highlight the dominant
19 position of these -- sorry, I didn't click my button fast
20 enough. My apologies.

21 If you look at this slide, Your Honor, it talks about how
22 the vessel performance products segment, which includes marine
23 water treatment chemicals, is dominated by two companies: Drew
24 Marine and the market's largest participant, Wilhelmsen.

25 And, Your Honor, there is testimony from customers that

1 they benefit from this intense competition from Wilhelmsen and
2 Drew, and articulating their fears of what it would mean if this
3 competition is lost.

4 And Mr. Bradley, if you could, again, black out the next
5 slide.

6 And defendants, in their ordinary course of business
7 documents, do not, Your Honor, and cannot avoid the obvious fact
8 that they are each other's closest competitors. And you can see
9 it with the examples that I've put up on the screen here,
10 highlighting the fierce and aggressive competition between them.

11 Mr. Bradley, you can turn the screen back on.

12 Now, defendants will tell you, Your Honor -- and I'm
13 confident of this -- that the FTC just plain has it wrong. They
14 will advance a number of arguments that we will take on in turn,
15 but to be sure, defendants are wrong on the facts, defendants
16 are wrong on the law, defendants are wrong on the economic
17 analysis, and defendants are wrong in not confronting market
18 realities.

19 And this is particularly true, Your Honor, when it comes to
20 market definition arguments. And defendants will have a real
21 problem here because their analysis is somewhat of a Jenga
22 tower. Their facts are wrong, and the economic analysis done by
23 their expert witness is deeply flawed. And you'll hear from us
24 over the course of the next few weeks, why that is the case.

25 And as I mentioned, Your Honor, there are some secondary

1 arguments put forth by defendants. They claim that there would
2 be sufficient entry or expansion by existing providers to
3 maintain competitive conditions. But there is a standard that
4 the courts apply: Would that entry be timely, likely, and
5 sufficient to obviate the anticompetitive effects?

6 And, here, the evidence is to the contrary, notwithstanding
7 that it would be defendants' burden to demonstrate entry in the
8 first place.

9 And the same holds true for the notion that there are
10 sufficient efficiencies present to overcome the presumption.
11 That will be defendants' burden, and they cannot show that their
12 purported efficiencies are substantiated.

13 And they also make a powerful buyer argument, Your Honor,
14 that these customers are powerful buyers that can withstand any
15 attempt to raise price. But most fundamentally here,
16 Your Honor, they ignore the fact that these customers cannot
17 have any leverage if there are no credible alternatives to turn
18 to.

19 In short, Your Honor, the defendants cannot even begin to
20 meet their burden of demonstrating some countervailing factor to
21 the presumption, should it be invoked, and it's very clear that
22 this illegal merger will result in a reduction in competition.
23 So let me talk through the standard analytical framework that's
24 applied in virtually every antitrust merger case, and that can
25 be applied here.

1 And a good place to start is with section 7 of the Clayton
2 Act, which is the operative statute. And the important language
3 is bolded here: Any line of commerce in any section of the
4 country where the effects of such acquisition may be
5 substantially to lessen competition.

6 And this seems a good place to briefly touch on one of
7 defendants' arguments -- and I'll just touch on it only in
8 passing -- but they claim that there is insufficient connection
9 with commerce in the United States within the meaning of the
10 statute, if I'm properly understanding their arguments. But
11 unlike the United Kingdom, there's no *de minimis* exemption in
12 the United States antitrust laws. And moreover, Your Honor,
13 consider that many of the major customers of these defendants
14 are U.S. companies, including Military Sealift Command, many
15 cruise ship lines, cargo or tanker operators. And of course,
16 Drew itself is located in the State of New Jersey. So that
17 argument doesn't make a whole lot of sense.

18 And as you can see from the plain language, Your Honor, a
19 violation of section 7 takes place where the merger may
20 substantially lessen competition. We don't need to show that
21 the merger will result in price increases or will result in a
22 reduction in quality competition. It may be that's the case,
23 but that's not something that we need to prove.

24 And while in many previous cases the FTC has pointed out
25 evidence of an intent to increase prices, that isn't a

1 requirement either. Antitrust law and the related economic
2 thinking are based on the premise that competitive markets are
3 beneficial to consumers in the form of price and quality and
4 that a reduction in competition may manifest itself in a
5 reduction in price or quality, but the law only requires a
6 showing that competition will be lessened. And we'll set forth
7 evidence making it clear that that's the case here.

8 The other legal standard that's important, Your Honor, is
9 the preliminary injunction standard. The FTC brings preliminary
10 injunctions under section 13(b) of the FTC Act, and they're
11 decided under what's called the public interest standard. And
12 two parts to that. The first is a likelihood of success on the
13 merits, and that's really where the crux of the issue is at this
14 hearing.

15 Under that standard, the question before the Court is
16 straightforward: Is it likely that the FTC would be able to
17 demonstrate the anticompetitive effects of the merger or that
18 the effect of the merger may be to lessen competition at the
19 administrative hearing?

20 And, Your Honor, two key words in that standard, is it
21 likely -- as opposed to certain -- and may -- as opposed to must
22 be -- to lessen competition.

23 And the second half of the test calls for a weighing of the
24 equities, and the balancing inherently falls on the side of the
25 FTC. Congress created our agency to implement and ensure

1 effective enforcement of the antitrust laws. And the public
2 equities are afforded much greater weight, and in fact, no
3 case -- no court has ever denied relief based on the equity
4 factors where the FTC has demonstrated a likelihood of success
5 on the merits.

6 Now, Your Honor, I've spoken a little bit over the course
7 of the past few minutes about a presumption that a merger is
8 anticompetitive, and that's really the guiding principle that
9 organizes the burden-shifting in an antitrust merger case. And
10 what it means is if there are high shares in a highly
11 concentrated market and the merger causes some significant
12 increase in high concentration -- in that concentration, then a
13 presumption takes hold that makes the merger illegal.

14 So let me just summarize how this framework is routinely
15 applied by the courts. First, definition of a relevant market
16 from both a product and a geographic standpoint. Once the
17 market is defined, we look at the concentration. If the market
18 is highly concentrated with high market shares and there are
19 guidelines in place to assess that, then the merger is
20 presumptively anticompetitive.

21 At that point, defendants have to rebut that presumption,
22 and there are a number of ways they can do that, here, by
23 showing entry that it's timely, likely and sufficient to
24 overcome the presumption, substantiated in merger-specific
25 efficiencies, or by meeting the elements of the power buyer

1 defense. The burden is on defendants to rebut. And on the
2 facts that we'll talk about today and over the next few weeks,
3 that will be a very difficult row for them to hoe.

4 Now, the Court will likely hear a fair amount of economic
5 analysis from both sides over the next few weeks, I suspect, and
6 let me just take a few minutes to give a high-level preview of
7 what it is I think may be discussed.

8 There's a standard way to work through the antitrust
9 analysis of competitive issues associated with a merger, and
10 that's using the framework outlined in the horizontal merger
11 guidelines which are put out by the DOJ and the FTC jointly.
12 These guidelines have been accepted not only by the agencies as
13 an analytic framework, but generally serve as the way -- basis
14 for the way courts think about the proper framework for
15 antitrust analysis.

16 And you can see the issues we talked about a moment ago --
17 and I'll preview just a few of these for the Court -- are set
18 forth within the guidelines. And, Your Honor, the Court may
19 already be aware of this -- a bit of Antitrust 101 -- but two
20 components to a relevant market under the guidelines approach:
21 Product market -- in this picture, apples -- and geographic
22 market, which I've put the globe up, assuming that everybody
23 likes apples and we could all agree on a global market.

24 Now, how do we go about defining these markets, Your Honor?
25 Well, the guidelines provide a road map, and it's a road map

1 that economists apply using a very simple test called the
2 hypothetical monopolist test. Now, Dr. Nevo, Aviv Nevo of the
3 University of Pennsylvania, will be here on our behalf in a few
4 days to explain this in more detail. But in a fundamental way,
5 the test looks at whether consumers would substitute to another
6 product if a hypothetical monopolist can impose -- and this will
7 be one of the few times I'll use jargon in the course of the
8 opening, Your Honor -- but if the hypothetical monopolist can
9 impose a small but significant nontransitory increase in price,
10 also known as a SSNIP, which is usually 5 percent, in the market
11 being tested. If the answer is yes, you've got your relevant
12 market. If it's no, then you move on to the next closest
13 product or service, add that, and run the test again. And
14 Dr. Nevo will certainly explain that far better than I can, Your
15 Honor.

16 Now, Dr. Nevo performed the hypothetical monopolist test,
17 and he'll tell you about that, but the bottom line of his
18 conclusions: The market here is for the supply of marine water
19 treatment chemical products and services to global fleets. And
20 as I mentioned before, Your Honor, the marine water treatment
21 chemical products and services in this market include boiler
22 water treatment and engine cooling water treatment chemicals.
23 And these are clustered together for analytic purposes, and I'll
24 turn to why that makes sense in a moment. The market also
25 includes a particular set of customers, global fleets, and these

1 are customers who can be targeted by defendants for price
2 increases.

3 And we talked about the hypothetical monopolist test a
4 moment ago. And this market passes that test. And it also has
5 certain practical indicia of a relevant market that are set
6 forth in a seminal Supreme Court case called *Brown Shoe*. For
7 example, the unique characteristics and uses of the product
8 specific to maritime uses -- and you'll hear why industrial
9 water treatment chemical suppliers have a completely different
10 model with regard to distribution. You'll hear that customers
11 value consistency with these products, that customers want a
12 single water treatment chemical supplier for their vessels, and
13 that they cannot and do not mix and match these vessels [sic] on
14 a port-by-port basis. Now, what does all that mean? It means
15 there are no meaningful substitutes that would allow a marine
16 water treatment chemical customer to avoid a SSNIP.

17 And the nuance I mentioned a moment ago, Your Honor,
18 boiling water treatment and cooling water treatment chemicals
19 are part of what economists call a cluster market. It's a very
20 well established concept in the case law, and we can think of it
21 quite simply: They're distinct products that face similar
22 competitive conditions that are combined into one market for
23 analytic convenience, the caveat being they can't be substitutes
24 for each other.

25 And here we think about the similar margins between the two

1 products, similar market concentration, the similar dynamics.

2 And one of the few things I think we'll agree upon with
3 defendants, I think, is that these products are not substitute
4 for each other between boiler water and engine cooling water
5 treatment.

6 I mentioned a moment ago, Your Honor, targeted customers,
7 which are the global fleets customers that we're talking about
8 here. And these are global fleets of ten or more globally
9 trading vessels above 1,000 gross tons -- they're large ships --
10 that travel to ports that are at least 2,000 nautical miles
11 apart within a given year.

12 And what's important is that these global fleets,
13 Your Honor, have things that they need. They need sophisticated
14 and reliable global suppliers who can deliver consistent product
15 wherever they need it whenever they need it. And the guidelines
16 specifically call for the applicability of a targeted customer
17 approach where a hypothetical monopolist could target a
18 particular set of customers for price discrimination.

19 There's no requirement that they currently be doing it, but
20 the requirement is that they be able to do so.

21 And, Mr. Bradley, if you could black out the screen again.

22 And just a couple of examples of how the defendants
23 themselves think about this market. The first is from a model
24 that Wilhelmsen uses, or used, to track its sales opportunities.
25 And they define their core market as large, globally trading

1 vessels.

2 Another document is from a capital markets day that
3 Wilhelmsen held a number of years ago. In a section called "our
4 market" Wilhelmsen confirms their targeted market, targeting
5 vessels trading globally.

6 You can put the screen back up, Mr. Bradley.

7 Now, there's not a lot, again, that defendants and us agree
8 on, but one thing, again, that we do agree on is that the
9 relevant market here from a geographic standpoint is global.

10 So I want to go ahead and put these principles into
11 practice, Your Honor, and see how this widely accepted
12 methodological approach I've described, an approach used in
13 virtually every merger case, applies here. And, Your Honor, we
14 looked at this pie chart before, and it's a very large piece of
15 pie between Wilhelmsen and Drew post-merger. And I only show
16 this to orient the Court to the scale of the market shares that
17 we're discussing here.

18 Now, in order to apply the presumption, Your Honor, we use
19 something -- one more piece of jargon -- called the
20 Herfindahl-Hirschman index, or the HHI. It sounds daunting.
21 The name is impressive. But it's really just a very simple way
22 to think about the level of market concentration using some
23 thresholds to think about the presumption. And it has two
24 dimensions.

25 First, does the post-merger HHI score -- and all that is is

1 adding up the squares of the market shares -- so does that score
2 exceed 2500? Well, here you see the score is 7200, so it blows
3 by that threshold.

4 The second thing you look at is whether the change in HHI
5 between pre- and post-merger is over 200. And here, Your Honor,
6 the change is about 3,563, about 16 times the threshold. So
7 using this standard analysis, Your Honor, the presumption is
8 readily met.

9 There have been a number of cases in D.C. that have
10 examined the presumptions and have looked at cases with combined
11 shares and post-merger HHIs that, frankly, are dwarfed by those
12 present here, and in every one of those cases on this list
13 brought over the past 20 years, the merger has been enjoined.
14 That's pretty telling.

15 Now, defendants would like to lower that market share, we
16 think, and we understand that. They'd like to lower that
17 presumption and not have to deal with it. And they are going to
18 use their expert witness to try to find a different set of
19 market shares. And to do so, what we see are meaningless shares
20 based strictly on vessel count, regardless of size, measuring
21 share without regard to what is sold to those vessels.

22 And the defendants would argue that regardless of vessel
23 size, that the small boat, like the tug boat positioned here, is
24 the same as the large boat in the foreground of the picture.
25 And that does not make sense and it doesn't take account of

1 actual purchases. It's another example where the tale
2 defendants are telling does not comport with reality.

3 So this is all we really need to show to get the
4 presumption, Your Honor. But how might the anticompetitive
5 nature of the merger manifest itself? Well, the evidence will
6 show Wilhelmsen and Drew are the dominant suppliers, the two
7 global players, and that smaller suppliers simply cannot
8 effectively compete.

9 Moreover, Your Honor, defendants are often the number 1 and
10 2 bidders, indeed often the only bidders, on framework
11 agreements to global fleets. Framework agreements are
12 agreements on price and terms to supply products like marine
13 water treatment chemicals. And in order to win those
14 agreements, defendants will offer price concessions and other
15 nonprice terms. And all of that competition would be lost
16 post-merger.

17 Now, you'll hear a lot of evidence over the next few weeks,
18 Your Honor, and that evidence will serve to confirm that strong
19 presumption that I've talked about, that this merger is
20 anticompetitive and illegal. The evidence cuts across a lot of
21 issues, Your Honor, and one way I like to think of it is tiles
22 in a mosaic. You put each tile down individually. They don't
23 look like much. But you stack the tiles up and you start
24 putting them together and a picture starts to take place.

25 And at the end of this case, when I have an opportunity to

1 summarize the evidence, I think you'll see that a very clear
2 picture is set forth in the tiles of an illegal merger.

3 And here are just a few tiles that you can expect to hear
4 about during the course of this proceeding.

5 And Mr. Bradley, if you would blank out the screen, please.

6 Now, Dr. Nevo has done a lot of economic work, a lot of --
7 I think my screen just went blank, Mr. Bradley.

8 I beg your pardon.

9 THE COURT: I can look at the --

10 MR. DILLICKRATH: Yeah. I'll just --

11 THE COURT: I'll look at the slide.

12 MR. DILLICKRATH: Thank you.

13 THE COURT: Just direct me to the page.

14 MR. DILLICKRATH: So we're on slide 43, Your Honor.

15 THE COURT: All right.

16 MR. DILLICKRATH: So, Your Honor, Dr. Nevo has done a
17 lot of economic analysis. And when you hear from him, he will
18 tell you a lot about that, but it's very interesting to look at
19 how often Wilhelmsen and Drew appear in their own data as each
20 other's competitors for global fleets. And if you look at those
21 numbers which are represented on this slide, it's hardly
22 surprising how often they're the ones who show up. And that
23 shows, Your Honor, the closeness of competition between them.

24 And, Your Honor, I won't spend too much time here, but
25 there are Drew executives, very senior executives, who will

1 testify that the biggest competitive threat to Drew comes from
2 Wilhelmsen. And there are Wilhelmsen presentations along the
3 same line. Another tile in the mosaic, Your Honor, and our
4 picture of an illegal merger is starting to appear.

5 There will also be sworn testimony from a number of
6 competitors, Your Honor -- a number of customers, pardon me.
7 And you'll hear from some of them this week. Customers who will
8 tell you that there is no other proven supplier who can offer
9 the same range of products on a global basis as Wilhelmsen or
10 Drew Marine. And that is notwithstanding other suppliers who
11 claim they can keep up with Wilhelmsen or Drew. Customers have
12 looked at these purported competitors, and what did these
13 customers conclude? That the smaller competitors can't handle
14 their business, they can't service all the ports, they can't
15 meet the price, they can't get product on a timely basis. All
16 sorts of reasons.

17 Now, the defendants may show you some websites or play some
18 promotional videos from some of these supposed competitors. And
19 what they say, Your Honor, they say. We won't dispute that
20 these documents say what they say.

21 THE COURT: Now, the screen seems to be coming back.
22 Is this --

23 MR. DILLICKRATH: It appears to be some issue --

24 THE COURT: It's partially coming back. All right.
25 We're back --

1 MR. DILLICKRATH: It is back, thank you.

2 THE COURT: Okay. Thank you.

3 MR. DILLICKRATH: Thank you, Your Honor. So I'll just
4 reiterate my point, that defendants are going to show you
5 probably some websites and some videos that will show
6 promotional videos or websites from these so-called competitors
7 saying that they're capable of playing in the market. But,
8 Your Honor, these are promotional materials. They're like a
9 ShamWow ad or a video from the chamber of commerce in Ames,
10 Iowa. They're puff pieces or hyperbolic marketing.

11 Now, Your Honor, customers view defendants as the two
12 largest and best suppliers. Marichem, a Greek supplier with its
13 most significance presence in the Mediterranean area, is the
14 next best choice, but like most smaller suppliers, they cannot
15 effectively service all the necessary ports, and they lack the
16 global reach and execution capabilities to do so efficiently.

17 Contrary to what defendants will tell you, it's not just a
18 matter of adding a port here or there. Customers want a network
19 in place that will provide service at the ports where they may
20 need to be, often unexpectedly. And for the reasons we
21 discussed earlier, no one is going to take a chance on an
22 unproven supplier. These chemicals are too important to a
23 ship's operation and customers need timely and consistent
24 deliveries of product and services.

25 Mr. Bradley, if I can again ask you to black out the next

1 couple of slides.

2 Now, sworn testimony will tell you, Your Honor, when
3 customers consider these other competitors, these small
4 competitors, they're inevitably disabused of the notion that
5 they have a realistic choice beyond the defendants. And if you
6 look at this chart I've prepared here, Your Honor, the left-hand
7 column are customers, and they are customers who have considered
8 the suppliers who are listed in the right-hand column. And in
9 every case, Your Honor, the customers have learned that these
10 suppliers are simply not up to the task.

11 So it's hardly surprising, Your Honor, that while the FTC
12 has extensive customer testimony supportive of its case, the
13 defendants appear to us to have none.

14 You can put these slides back on the screen, Mr. Bradley.

15 Now, with the presumption firmly in place, Your Honor, it's
16 up to defendants to rebut that presumption, and they cannot even
17 begin to do so. We can go back to the horizontal merger
18 guidelines very quickly. And again, note the standard for
19 entry. It has to be timely, likely, and sufficient to deter or
20 counteract the competitive effects of concerns. But high entry
21 barriers, that's enough to eliminate the possibility that
22 reduced competition could be offset by entry or expansion. And
23 consider the very characteristics of these defendants, both very
24 impressive companies, as I noted. They operate globally,
25 between them, over 260 warehouse or distribution centers, over

1 500 employees, decades of reputation --

2 THE COURT: Again, slow down a little bit for my court
3 reporter.

4 MR. DILLICKRATH: I'm sorry. I'm from New York, Your
5 Honor. I tend to do that sometimes.

6 Decades of reputation and brand equity.

7 You'll also hear it from third parties, Your Honor, and
8 that includes competitors and companies who are not now in the
9 market, but have no interest in entering. Entry and expansion
10 will not replace the competition lost from Drew because small
11 competitors simply can't, and other entities don't want to.

12 And, Your Honor, there are a myriad of examples of
13 defendants' awareness of these entry barriers. Here is just one
14 from a Drew presentation to Moody's. And, here, Drew notes that
15 their established global presence creates a significant barrier
16 to entry, and they acknowledge that it would be difficult and
17 costly to replicate. And that is just what an entrant would
18 need to do.

19 So let me talk briefly, Your Honor, about potential
20 entrants and see what they have to say about this notion put
21 forth by the defendants that they can replace Drew in the
22 market.

23 You'll hear from small competitors that are simply unable
24 to spend the money it would take to enter the market in a big
25 way and replace the lost competition. Indeed, you'll hear from

1 one small business owner located in Slidell, Louisiana, who
2 noted that he would have to win the lottery in order to expand
3 to a global network, and as he noted, we don't have any lottery
4 winners.

5 Mr. Bradley, can you black out the public screen again?

6 Now, you'll also hear from defendants about something
7 called a ship chandler. And ship chandlers supply all sorts of
8 items, from cigarettes to soda to floor cleaning chemicals to
9 vessels. You can think of them as a high-priced Walmart of the
10 seas. But these ship chandlers -- they do deliver some marine
11 water treatment chemical products, including some of the large
12 chandlers, but they provide no services. They're simply a
13 delivery mechanism.

14 And even one of the largest chandlers has testified that it
15 has no plans to expand into marine water treatment chemicals so
16 as to replace Drew, and in fact, testified that it has no plans
17 to blend, to resell, to provide technical services or training
18 for marine water treatment chemicals, and that this merger does
19 not change its non-plans.

20 Defendants will also talk about toll blenders, and they are
21 companies who blend chemicals on behalf of other companies.

22 Now, defendants have a speculative theory, devoid of all factual
23 support. They suggest that toll blenders and ship chandlers
24 will team up to create a new competitor. There's no evidence
25 whatsoever, Your Honor, that any toll blender or chandler will

1 even consider this. Indeed, the evidence is to the contrary.
2 One major toll blender, who is also an industrial supplier, has
3 specifically stated that it does not and has no plans to sell
4 marine water treatment chemicals directly, and in fact, the
5 former parent of that toll blender was an entity that divested a
6 marine water treatment chemicals company years ago because it no
7 longer wanted to be in that business.

8 And I mentioned industrial suppliers. There are people who
9 supply water treatment chemicals for land-based engine and
10 boilers, nonmarine-associated uses. And defendants have a wild
11 idea that these industrial suppliers, companies that provide
12 water treatment in a nonmarine context, will suddenly enter the
13 marine water treatment chemical market.

14 Industrial suppliers have testified they do not and have no
15 plans to enter marine water treatment chemicals because they
16 lack the infrastructure to do so. And you'll hear from one of
17 those industrial suppliers during the hearing.

18 Mr. Bradley, you can let this screen public again. And
19 that will be the last time I need to close the screen.

20 Now, you'll hear more about this, Your Honor, from
21 Dr. Nevo, and he'll tell you that if there were no barriers and
22 if Drew could be easily replicated, existing competitors would
23 have already one so, and you wouldn't see the share in margin
24 that you see now. And that's a very intuitive point, and it's a
25 point well supported by the economics.

1 You might also wonder, Your Honor, what is Wilhelmsen
2 paying for if all of this entry is going to take place? That
3 seems like a good question to us, and the answer seems
4 counterintuitive.

5 Now, I just spoke about the story defendants told about
6 chandlers and industrial suppliers partnering up. But again,
7 economic theory would have us ask, why hasn't it happened yet?
8 And we think the answer is because the barriers to entry are
9 just too high.

10 Now, defendants will also argue that there are efficiencies
11 present sufficient to overcome the presumption. And the case
12 law is clear, Your Honor, the bar is extremely high. We've had
13 these cases in our briefing, and I'll most saliently point you
14 out to the case *ProMedica*, holding that no court has ever found
15 efficiencies sufficient to rescue an otherwise illegal merger,
16 and that's still a true statement.

17 You'll hear testimony from Dr. Dov Rothman about why
18 defendants fail to even approach the bar. But just two points
19 by way of preview. Defendants' so-called cost savings assume a
20 fixed across-the-board reduction in Drew's cost of goods sold,
21 with no explanation of how they get there. And their
22 efficiencies are unsubstantiated, resting solely on the judgment
23 and guesstimates of Wilhelmsen employees. And to quote Gertrude
24 Stein, there's simply no "there" there.

25 Briefly, I want to discuss defendants' arguments that

1 global fleets' customers are powerful buyers. Defendants argue
2 that these buyers could simply stock up in fewer ports or could
3 threaten to ship their purchases of marine water treatment
4 chemicals to non -- to others -- let me start that again,
5 Your Honor. They would threaten to shift their purchases of
6 nonmarine water treatment chemicals to others as part of a
7 negotiating ploy. But why aren't they doing that now,
8 Your Honor? It certainly would not become easier after the
9 merger.

10 And the hypothetical merger -- the horizontal merger
11 guidelines and the case law are both pretty clear. Without
12 credible alternatives, buyers can't have leverage. And the
13 evidence will show that there are no credible alternatives.

14 So, Your Honor, the plaintiffs have met and exceeded their
15 burden. We will provide compelling evidence over the next few
16 weeks, as well as the presumption. And as I've noted over the
17 course of the past 40 minutes, the Court will hear from a number
18 of our witnesses. You'll hear from customers, including
19 Military Sealift Command, cruise lines, tankers, ship management
20 companies. You'll hear from marine chemical suppliers. You'll
21 hear from industrial chemical suppliers. You'll hear from a
22 Wilhelmsen third-party consultant. And you'll hear from a Drew
23 executive. We'll also have testimony that I hope the Court will
24 find useful from an antitrust economist and an efficiencies
25 expert.

1 And our conclusions, as I said, Your Honor, are consistent
2 with two foreign competition agencies who have already
3 investigated this merger. That's certainly not dispositive, but
4 it is interesting, because the CCCS, the Singapore agency, just
5 last Friday found a substantial lessening of competition in the
6 market for the supply of marine water treatment chemicals, and
7 also made a provisional finding that the parties are each
8 other's closest competitors.

9 So let me go back to where I started, Your Honor: Why are
10 we here? Well, we're here because there is overwhelming
11 evidence of an illegal merger. The facts are clear. The
12 analysis is straightforward and buttressed by the facts, the
13 economic analysis and decades of precedent. Defendants have no
14 rebuttal except their own self-serving statements, unsupported
15 flights of fancy, and unproven speculative and misapplied
16 economic theories unconstrained by the record evidence.

17 Your Honor, the relief we request here is limited. We ask
18 for a preliminary injunction only to preserve the status quo
19 until the merits proceeding set to begin in less than two months
20 is fully decided. We ask the Court to preserve competition and
21 protect these U.S. customers from the immediate and pernicious
22 effects of allowing this illegal merger to proceed while the
23 administrative proceeding is pending.

24 I thank you for your time, Your Honor, and the FTC looks
25 forward to providing you with the support for everything that

1 I've said here today. Thank you.

2 THE COURT: Thank you, Mr. Dillickrath.

3 Okay. My court reporter says he wants to keep going, so
4 we're going to keep going.

5 Mr. Roush? And for purposes of planning for the afternoon,
6 I have a hearing on a TRO scheduled to begin at 2:30. So we can
7 either -- we can break for lunch later and you all just resume
8 after that, or we can break for lunch at the planned time, start
9 back up for a half an hour and then break for the hearing. We
10 can see where we are. I'm flexible. But we do have that
11 hearing at 2:30.

12 MR. DILLICKRATH: Why don't we see where we are.

13 THE COURT: Let's see where we are. I only need about
14 half an hour for lunch, but I need to get ready for that.

15 OPENING STATEMENT BY COUNSEL FOR DEFENDANT WILHELMSSEN

16 MR. ROUSH: Thank you, Your Honor. Corey Roush on
17 behalf of the Wilhelmsen defendants. What you'll hear over the
18 next week from the FTC, and indeed what you just heard from the
19 FTC, is a construct of what the industry looks like today. And
20 that word "construct" is not my word; it's the word of their
21 expert. He will tell you that he did not look at fleets as they
22 actually exist. Instead, he took data and he constructed the
23 global fleets.

24 And what that construct does is it gives them high market
25 shares. Those high market shares then serve as the building

1 blocks for all of their economic analysis.

2 You'll hear about a GUPPI analysis. You'll hear about a
3 merger simulation analysis. You've heard about the hypothetical
4 monopolist test. All of them are based in some way on those
5 market shares.

6 You will also hear that those high market shares are
7 sufficiently predictive so as to be determinative. But shares
8 are not supposed to be the beginning and the end of the
9 analysis. Indeed, the relevant inquiry, put simply, here is
10 whether Wilhelmsen post-merger will be able to raise prices or
11 decrease services for a sustained period of time. And they will
12 not.

13 You will hear that defendants have a very different
14 perspective on what the market looks like today. We will
15 present evidence that Wilhelmsen and Drew are the primary
16 providers of boiler water treatment chemicals to 31 percent of
17 the relevant vessels. And they are the primary providers of
18 cooling water treatment chemicals to 33 percent of the relevant
19 vessels. Those numbers are well below the percentages needed to
20 get to the FTC's presumption. And what they mean is that 67 to
21 69 percent of the relevant vessels are getting their current
22 boiler water and cooling water treatment chemicals from somebody
23 else. And if you end up finding that our shares are right, we
24 think your analysis is largely done, Your Honor.

25 Putting that aside, defendants think this Court should look

1 at more than today's market shares when considering what will
2 happen in the future. This Court should consider the power
3 buyers who bought the products at issue. And we'll give you
4 evidence on that. The Court should consider where the products
5 at issue are bought. And we'll give you evidence on that. The
6 Court should consider where the products could be bought. And
7 we'll give you evidence on that. And ultimately, Your Honor,
8 the Court should look at who those products could be bought
9 from. And we'll give you evidence on that.

10 Ultimately, you will hear that the customers at issue will
11 not be taking price increases. They have many options. You
12 will hear that Wilhelmsen knows this and plans to lower prices
13 after the merger because losing customers will undercut the
14 efficiencies that are the basis for this deal.

15 To that end, you will hear that Wilhelmsen is doing this
16 deal to get tens of millions of dollars in efficiencies and to
17 better compete against current suppliers, expected entrants and
18 the digitization of the industry that is already occurring.

19 You will not hear from anyone at Wilhelmsen that they plan
20 to raise prices. You will not hear from anyone that they have
21 assumed revenue from increased prices. You will not see a
22 single document where Wilhelmsen anticipates a merger-related
23 increase or an expected bump in revenue. Far from it. You will
24 hear that Wilhelmsen, in its normal course analysis of this
25 deal, plans to drop prices to try to keep customers from going

1 somewhere else.

2 So let's look at a document that was created as they were
3 considering this transaction, Your Honor.

4 This document is a document that underpins their
5 efficiencies, but also looks at some of the risks that are
6 associated with the deal. And two of the risks that they noted
7 as they looked at this deal was that it could create space for a
8 more agile number 2 player, and another risk where customers
9 would leave the merged company for competitors. And that was
10 especially true for customers that wanted dual suppliers or
11 frankly just didn't like Wilhelmsen.

12 So taking those risks, Wilhelmsen said, how can we mitigate
13 that if we're going to do this deal? So they said, we can
14 mitigate that by sharing the upside with the customers. We can
15 lower prices. And then they built that into their efficiencies
16 model. So when I talk about tens of millions of dollars in
17 efficiencies, they assumed the price decrease. And even after
18 that price decrease, the efficiencies model assumes they will
19 still lose customers to current competitors. And they're
20 considering here in this second green flag bullet that they will
21 need to discount further in the future, although that's not
22 built into the efficiencies case.

23 And before I turn to looking at the competitors who they're
24 afraid they're going to lose customers to, the FTC wants you to
25 apply a standard that is less strenuous than you would be

1 applying if the plaintiff here was the Department of Justice
2 antitrust division. And their logic -- and they use it in all
3 the cases that they bring -- is that the merger will actually be
4 reviewed by an administrative law judge, and that his decision
5 will be reviewed by the FTC commissioners, and six to eight
6 months from now we'll have a decision on a permanent injunction.

7 We understand the case law that they're relying on, and
8 we're not here to argue that it's wrong. We are here to point
9 out that it's inconsistent with the facts. It's inconsistent
10 with the fact that a preliminary injunction before Your Honor
11 typically is the end of the analysis. Permanent injunction
12 cases in merger contexts do not happen.

13 Indeed, just a few months ago, three new commissioners at
14 the FTC, during their senate confirmation hearings, including
15 the new chairman of the FTC, said they disagreed with applying a
16 different standard in merger cases when they bring it versus
17 when the Department of Justice brings it.

18 Moreover, to be clear, there will be no hearing before an
19 administrative law judge. The defendants have agreed that if
20 you decide to block this merger, they're done. We've informed
21 the administrative court of this. We have a sworn affidavit
22 from the president of Wilhelmsen Ship Services. So you are the
23 ultimate arbiter on this merger, and if you think it's a close
24 call at the end, please don't issue a preliminary injunction
25 because there's this fiction that there will be some other judge

1 looking at it for a permanent injunction.

2 Now to talk about those current competitors that Wilhelmsen
3 is concerned about. You heard the FTC say essentially we should
4 ignore them. And why should we ignore them? Because they have
5 low revenues today. And because they have low revenues today,
6 that means they'll have low revenues tomorrow. They don't have
7 the ability or willingness to grow.

8 As the FTC's expert, Dr. Nevo, explained in his deposition,
9 in his view, market shares, based on those revenues, are the key
10 to determining barriers to entry. And for that reason, he
11 didn't consider any of the alleged barriers to entry
12 individually. But low revenue numbers today are not
13 determinative of the future in this case for at least two
14 reasons.

15 First, where the focus, based on the government's own
16 theory, is geography, where the vessels are going, and where
17 they're going to be bought, the revenues of the current
18 competitors don't matter. What matters is where they are and
19 where they can be. So let's look at the geographic coverage,
20 Your Honor.

21 This is Wilhelmsen 's geographic coverage map. As you can
22 see, it's all over the world, six continents. And we talk about
23 six continents because Antarctica doesn't have a lot of ports.
24 So six continents, countries all over the world, except along
25 the east coast of Africa.

1 This is Drew Marine's coverage map. Largely the same
2 thing. Wilhelmsen is not doing this deal to expand its global
3 coverage.

4 Let's look at Marichem's map. Six continents, countries
5 all over the world. Vecom's map. Six continents, countries all
6 over the world. Uniservice Group, a group of independent
7 companies that have worked together, selling the same product
8 under the same brand. Six continents all over the world.

9 Marine Care. Less countries, less ports, but still serving
10 over a hundred ports on six continents all over the world.

11 Bluetech. A few less dots, but still on six continents,
12 and countries all over the world.

13 And all of the competitors that I just pointed to already
14 sell boiler and cooling water treatment chemicals. In fact, it
15 is conceded that they are all in the market, selling products to
16 global fleets.

17 Now, another competitor does not sell boiler water
18 treatment chemicals. It's still in the market because it sells
19 cooling water chemical treatments. And this competitor is
20 Chevron Marine, a subsidiary of Chevron, one of the largest
21 companies in the world. And they're on five continents,
22 countries all over the world .

23 Your Honor, if you look at the combined global coverage of
24 these competitors, there is no question that they cover the
25 entire globe except, again, for the eastern coast of Africa.

1 If you look at the United States and you take the primary
2 ports in the United States -- New York, Miami, Houston, L.A.,
3 the upper northwest -- you can see that five or all six are in
4 all of these cities.

5 And if you look at some of the major ports around the
6 world, you will see that they are all in them. And I looked at
7 the slide that you saw in the FTC's opening, and that --
8 fortunately, for that hypothetical vessel they used, Shanghai,
9 Cape Town, Rio, and Miami, they're all already there.

10 So I said there were two reasons, Your Honor, that looking
11 at just revenues here, past revenues, is not the way to look at
12 it. The second reason is because the past looks different than
13 the future. It seems like a simple point, but it gets lost when
14 you focus only on past revenues.

15 So, today, the current competitive condition involves Drew
16 and Wilhelmsen and these other competitors competing. Tomorrow,
17 Drew won't be there. That changes opportunities and it changes
18 incentives of competitors. And so we're going to present
19 evidence to Your Honor about what our competitors would do. And
20 here are a few pieces of it. Uniservice Germany: We think our
21 water treatment chemicals business will expand considerably if
22 this merger comes to happen.

23 Marine Care: It is our strong opinion that if the merger
24 goes through, the market will be moving a lot more towards
25 diversification, and we're going to take advantage of it.

1 Marichem: We continue expanding our sales offices in the
2 major marine markets in the world. We are now participating in
3 a tender to start cooperation with Incentra. Marichem is one of
4 the largest group purchasing organizations in the world,
5 covering 900 vessels. And a group purchasing organization in
6 this industry is like in others. They bring together the
7 collective buying power of their members to negotiate favorable
8 terms with suppliers like Marichem.

9 Now, none of these quotes, Your Honor, are things that the
10 FTC's expert, Dr. Nevo, considered. And the FTC would ask us
11 that we ignore these because they come from competitors. But
12 these are the best evidence of what competitors will do in the
13 future.

14 Now, another way that the FTC -- if you'd like me to leave
15 the slides up, I can. I just --

16 THE COURT: No, that's fine.

17 MR. ROUSH: Okay. Another way that the FTC tries to
18 diminish the current level of competition and, thus, the future
19 level of competition is to define a very narrow market. And
20 they've done that in two ways: A narrow set of products and a
21 narrow set of customers.

22 So these are the products that Wilhelmsen and Drew -- or
23 the product categories that Wilhelmsen and Drew sell in
24 competition with one another. And as you can see, Wilhelmsen,
25 its boiler and cooling water treatment products make up only 15

1 percent of its sales. And for Drew, that's 26 percent. But
2 they also sell a host of other products. And they sell these
3 products in conjunction with one another.

4 So this is a little complicated chart, Your Honor, but what
5 it shows is that, for the vessels -- for the global fleets that
6 purchase boiler water and cooling water treatment from
7 Wilhelmsen, 99 percent of them are buying two or more other
8 product categories. And that number is 94 percent for Drew. So
9 there's no question that these products, the boiler and cooling
10 water treatment chemicals are being sold with other products and
11 product categories.

12 And here are some of those products and product categories.
13 And a lot of times, when you're defining a market -- and we do
14 agree with the FTC that none know of these products are
15 interchangeable. So a lot of times when you have products that
16 are not functionally equivalent, you start with one product
17 category and you look at that and you look at the competitive
18 conditions of that one category. But they haven't done that.

19 Now, another way of doing it is you take a group of the
20 products and you look at them and you look at the competitive
21 conditions of that group. And that would make sense here
22 because both Wilhelmsen and Drew in all their documents talk
23 about water treatment chemicals. They look at them from a
24 marketing perspective together. They look at them from a
25 financing perspective together. But they didn't do that.

1 Now, it appears they do. If you look at the complaint, it
2 originally alleges a market that is water treatment chemicals,
3 primarily made up of boiler and cooling water treatment
4 chemicals -- and even in the first slide of the deck that you
5 just saw, it says water treatment chemicals. But that's not the
6 market that is being alleged here, Your Honor.

7 We asked their expert if he saw any instances in any
8 Wilhelmsen and Drew documents where they marketed just these two
9 product categories together, or where they treated them
10 separately in financials. And he couldn't recall any. We asked
11 him, why not define it this way? He didn't really have an
12 answer, but he did point out that these two products make up 77
13 to 80 percent of the water treatment products they sell, and
14 said that was enough. Well, we disagree. Pulling out 20 to 23
15 percent of the sales in a category to get to a smaller market
16 isn't the way it should be done.

17 Another way of defining a market, Your Honor, is to take
18 all the products. And when you hear references to *Staples*,
19 that's what they did there with the exception of toner. They
20 looked at all the products. They looked at the products that
21 were being negotiated together, the products that were in the
22 contracts -- here, they're called framework agreements --
23 together. They're being bought together. They're being
24 delivered together. But they didn't do it that way either,
25 Your Honor.

1 Now, in the FTC's reply brief, they say that there are
2 different competitive conditions for some of these categories.
3 But last Thursday, when we deposed their expert, he said he did
4 only -- and I want to quote this -- some very preliminary
5 analysis, end quote, and is not offering an opinion on whether
6 this would be an appropriate market.

7 So why is this important, Your Honor? Because you're going
8 to be presented evidence on a market that involves two product
9 categories. That's the analysis that's been done by their
10 expert. That's what they're putting on. So it's not a market
11 for boiler water treatment chemicals. It's not a market for
12 water treatment chemicals, all of them. It's not a market for
13 all of these. And so if you're uncomfortable at the end that we
14 shouldn't just have a product market that includes only these
15 product categories, the analysis on market definition is done,
16 and we think the case is done.

17 Now, you will hear, Your Honor, that you shouldn't be
18 looking at boiler and cooling water treatment chemicals together
19 because they aren't bought together. In fact, I mentioned
20 Chevron Marine. Chevron Marine only sells cooling water
21 treatment chemicals. So by definition, every customer that gets
22 cooling water treatment chemicals from Chevron Marine is buying
23 boiler water treatment chemicals from someone else. And you
24 will also hear that when they are bought together, it's almost
25 never just the two of them.

1 So this is from one customer, Your Honor, who may be at
2 trial. They have a fixed fee arrangement for a relatively small
3 number of products. And as you can see in green, a couple of
4 them are boiler, including water treatment products. But they
5 also have, in that same fixed fee arrangement, other water
6 treatment chemicals in blue, cleaning chemicals in orange, and
7 foam control, a separate product, in purple. So when they are
8 being sold together, it's with other products.

9 Now, the effect of defining the market in the way that they
10 have is that it allows their efficiencies experts to narrow the
11 efficiencies on which he focuses. So I mentioned tens of
12 millions of dollars in efficiencies. That's across all the
13 products that we'll be bringing together. But he said the way
14 you do the efficiencies analysis is you only look at the
15 efficiencies from the products in the alleged market. So tens
16 of millions shrinks way down because these products only make up
17 15 percent of Wilhelmsen's sales.

18 Now, you will hear evidence that indicates that that's not
19 the right way to look at efficiencies, that where, as here, all
20 the benefits of the integration and the efficiencies come from
21 all of the products, that essentially they are inextricably
22 linked -- and that's a merger guidelines word or phrase -- that
23 you should look at all of them together.

24 Now to turn to the narrow set of customers, Your Honor.
25 There's a set of data that both experts use. It's called

1 Lloyd's data. So there's no dispute about the use of this data.
2 Lloyd's data indicated that as of December of 2017, there are
3 over 73,000 -- I'll call them ocean-going vessels.

4 Now, make no mistake, that Wilhelmsen, Drew, they want to
5 sell boiler and cooling water treatment chemical to every one of
6 these vessels. But in the ordinary course, Wilhelmsen has made
7 decisions that it can't focus on all 73,000 vessels. And so it
8 typically focuses on vessels that are over a thousand -- greater
9 than or equal to a thousand gross tons. And that's been its
10 plan and the way it has done this for almost a decade,
11 Your Honor. It focuses on what is calls the global fleet, and
12 that's all of these vessels as of December 2017, 47,011.

13 Now, what Dr. Nevo, the FTC's expert, does, is he says,
14 okay, we'll take your thousand; I hear you; we'll stick with the
15 thousand and won't look at the smaller ones because you're not
16 looking at them that much. But instead of doing a
17 vessel-by-vessel analysis, or instead of looking at the way
18 fleets actually exist, he does his construct. And the reason
19 it's called a construct is because it doesn't take fleets as
20 they exist in the normal course. It uses that Lloyd's data and
21 it looks at a couple of fields in that and it starts breaking
22 the fleets up.

23 And to be sure, for many of the fleets, they match the real
24 world. But for a number of fleets it doesn't match. And so we
25 will give you examples, Your Honor, of fleets that are almost

1 400 vessels in the real world, and they have a pricing contract
2 that applies to all 400. But in Nevo's construct, they are
3 divided among over 50 fleets.

4 So he gets his construct -- and this is -- he has 9,407
5 constructed fleets. And I'm using "constructed" here. He
6 doesn't call them constructed fleets. This is a global -- it's
7 a global network case, so we need to say that they have to have
8 globally trading vessels. And you heard about globally trading
9 vessels in the FTC's opening.

10 Now, globally trading vessels, while that concept is
11 certainly in Wilhelmsen's documents -- and you saw one of
12 them -- it is not used in the normal course of business at
13 Wilhelmsen to target customers, to look at customers, to think
14 about customers. In the very document you saw a picture of that
15 talked about global -- the first document you saw that talked
16 about globally trading vessels, that very document focuses on
17 vessels that are greater than or equal to 1,000 gross tons.

18 So he says it has to have a globally trading vessel. He
19 says, no, it has to have ten globally trading vessels. And you
20 will not see any evidence in our files, Wilhelmsen's files or
21 from Drew's files, where anyone has ever thought about looking
22 at customers to see whether they had ten or more globally
23 trading vessels. And certainly no one has ever treated them
24 differently as a result of that.

25 So he's got 9,407. He says, we're only going to look at

1 those that have ten globally trading vessels. And all of a
2 sudden, we cut out 94 percent of all of his constructed vessels.

3 Now, you will hear that these shaded-out vessels, the ones
4 that the FTC and Dr. Nevo are not worried about here -- you will
5 hear that many of them have globally trading vessels. Indeed,
6 by definition, they could all have nine globally trading
7 vessels, but they still wouldn't be in the alleged market. They
8 don't all have nine. But they could.

9 You will also hear that many are members of group
10 purchasing organizations, the same group purchasing
11 organizations that a number of the global fleets are in. So
12 they're getting the advantage of the same pricing that the
13 global fleets are getting, but they're not in the market.

14 You will also hear that the 532 global fleets on which this
15 case is based are today getting lower prices than the rest of
16 these vessels.

17 Of the 532, you will hear from only a handful, not just at
18 trial, but in the declarations and in the depositions. Despite
19 the exhaustive process that the FTC went through, you're only
20 going to hear from a handful. And I don't think you'll hear,
21 Your Honor, that there's any reason to view the views of a
22 handful to be representative of the 532 or the 9,407 that we
23 think you should be focused on.

24 Now, is there something to the fact that defendants have
25 high shares among this small group? No. The analysis here is

1 not whether you can identify a set of customers that are
2 primarily being served by the two merging parties. The analysis
3 is whether you can identify a set of customers against whom the
4 merging parties could implement a sustained price increase or
5 service decrease looking forward. And you'll find that you
6 can't identify that set, Your Honor.

7 Now, ironically, once the government has constructed its
8 market, it's left with an alleged harm in the United States that
9 appears to range from 800,000 to 2.7 million. Now, I say
10 appears to range because neither the FTC nor its expert has many
11 any effort to calculate the harm to the U.S. The FTC says in
12 its reply brief -- and I think it said in the opening -- that
13 American consumers will be harmed by this illegal merger. But
14 there's no citation to this statement, and you won't find a
15 single place in the record or their brief where anybody tries to
16 quantify what the harm in the U.S. will be.

17 As we talked about -- like -- we deposed Dr. Nevo last
18 Thursday. We asked him about this: Have you been asked to
19 calculate the potential harm in the U.S.?

20 No, I have not.

21 Have you attempted to calculate the potential harm in the
22 U.S.?

23 No, I have not.

24 If you were asked to calculate the potential harm in the
25 U.S., how would you do it?

1 I can't offer an opinion on that right now.

2 So you don't know how you would do it?

3 As I sit here today, I'd have to think about it.

4 Now, this is not a trivial issue. Even as you heard in the
5 FTC's opening, the relevant inquiry under the Clayton Act is to
6 identify whether competition may be substantially lessened in
7 the United States, and in particular, in any section of the
8 country. We think it is significant, Your Honor, that neither
9 the FTC nor Dr. Nevo has tried to categorically assess this.

10 Another ironic result of the FTC and their expert's
11 constructed market is that they are left focusing on huge
12 customers. You will hear from Teekay and Crowley this
13 afternoon. You will hear from Carnival, we believe, tomorrow.
14 You will hear about or may hear from Maersk and Royal Caribbean.
15 These are all multibillion-dollar companies. Many of them dwarf
16 Wilhelmsen. And their purchasing power is significant, and it's
17 very significant to Wilhelmsen, Drew, and their competitors.

18 Now, the FTC states in their reply brief that these aren't
19 power buyers, but their expert has said he had done no analysis
20 to assess that. These fleets don't need protection because they
21 have many ways to avoid price increases.

22 We talked about earlier the multiple competitors that are
23 admittedly already in the market that are offering boiler and
24 cooling water treatment chemicals. They could turn to any of
25 these. And you saw their global networks. And we weren't

1 looking at regional players there, Your Honor. It wasn't like
2 Vecom was in the United States and Uniservice was down in South
3 America. They were all all over the world.

4 And these global fleets, they're traveling all over the
5 world. They're traveling to 260 to 270, on average, ports every
6 year. But they're buying boiler and cooling water treatment
7 chemicals in 15 to 20.

8 So if they wanted to switch to one of our competitors and
9 that competitor didn't happen to be in one of the 15 to 20, they
10 could ask them -- or they could see if they were in one of the
11 other 240, and then they could shift the purchasing patterns
12 there.

13 Now, if you look at that on a per-vessel basis, you get the
14 same rough percentages. On average, the vessels in the global
15 fleets, they are traveling to about 20 ports a year, but they're
16 buying boiler and cooling water treatment chemicals at only two.
17 And so if, for some reason, one of our competitors wasn't in
18 those two, they could ask them to be in one of the other 20.

19 And that sort of sponsored entry is exactly what defines a
20 power buyer.

21 Now, I'll leave you with this, Your Honor, because I want
22 to leave some time for Mr. Ryan. The other way that they could
23 easily defeat a price increase is to return to a slide I showed
24 you earlier. The alleged market comprises only 15 percent of
25 Wilhelmsen's sales to these global fleets and 26 percent of

1 Drew's. And we know that 99 percent of Wilhelmsen's global
2 fleet customers are buying two or more other categories of
3 products from Wilhelmsen, and 94 percent of Drew's.

4 So if Wilhelmsen tried to put in the roughly 50 percent
5 price increase that their expert proposes and they said, you
6 know what, I don't have a choice on boiler and cooling water,
7 but I have choices on the other 85 percent, so if you want me to
8 pay 50 percent more on boiler and cooling, I'm going elsewhere
9 with the rest of my other products.

10 And not even a hundred percent price increase would make
11 financial sense for Wilhelmsen, to raise the price a hundred
12 percent on the 15 percent of its business that is boiler and
13 cooling water treatment products, to give up the other 85
14 percent.

15 I appreciate your time, Your Honor. Now Mr. Ryan is going
16 to talk to you about lack of barriers to entry and ease of
17 expansion.

18 THE COURT: All right. Just a minute, Mr. Ryan.

19 Okay. I'm sorry -- we have to take a break. My court
20 reporter has been going for over an hour and a half, and we're
21 going to have to take a brief break. And we'll come back. 15
22 minutes.

23 (Recess from 11:15 a.m. to 11:36 a.m.)

24 THE COURT: All right, Mr. Ryan.

25 MR. RYAN: Thank you, Your Honor, and again, I'm

1 Mark Ryan for the Drew Marine defendants.

2 OPENING STATEMENT BY COUNSEL BY DEFENDANT DREW MARINE

3 A critical question in this case is whether
4 competition for the sales of boiler water and cooling water that
5 will be lost because of the acquisition will be replaced by the
6 expansion of competition from existing firms. More
7 specifically, will there be a credible marketplace threat that
8 competition can be replaced?

9 So let's begin with the question of what Drew sells today,
10 before the merger. What competition will be lost and what
11 competition, therefore, needs to be replaced. That's really a
12 fundamental issue before the Court.

13 So the slide that's up on the screen now is a description
14 of Drew Marine's water treatment product sales. And here we've
15 got, on the left, all customers, and then over on the right,
16 what are Drew's global sales to -- what are Drew's sales to
17 global fleets? And this \$22.6 million number is a number taken
18 from the FTC's expert's report. So \$22.6 million globally is
19 what we're talking about in the alleged relevant market with
20 respect to Drew.

21 Now, as the Court has heard this morning, distribution or
22 port coverage is an issue in the case. Global fleets and other
23 fleets need product at a number of ports. So let's look at
24 Drew's port sales. And we'll put up the next slide.

25 This slide, Your Honor, shows the concentration of Drew's

1 sales, and it shows that they're heavily concentrated at a small
2 number of ports. So two-thirds of Drew's sales of the relevant
3 product occur at 20 ports, 80 percent at 40 ports, and 90
4 percent at 60 ports. So as we hear evidence throughout the trial
5 about what's necessary to compete for global fleet business,
6 keep in mind that Drew's sales are heavily concentrated at a
7 small number of ports.

8 Now, these are the busiest ports in the world. And the
9 evidence will show that at these ports there are lots of
10 competitors already present. And someone might ask, why is
11 business so concentrated at relatively few ports? The evidence
12 will also show that the big fleets want to do business at fewer
13 and fewer ports. They believe that the fewer ports they can do
14 business at, the better it is for them.

15 So this is a market reality. Big fleets demand more
16 service at bigger ports. And suppliers respond to the big fleet
17 demands. The big fleets call the shots in this industry,
18 Your Honor.

19 The next question is, where will the replacement of these
20 sales come from? Who will the global fleets that the government
21 is alleging it needs to protect be able to turn to as
22 alternative suppliers?

23 So we have another slide, and that's the same slide that's
24 reflected on this board over here, Your Honor. I might wander
25 just a little bit, but I'll keep my voice up.

1 These are the participants today participating in the
2 marine water treatment chemicals industry. And the question for
3 the Court is, will the global fleets that we've heard about, the
4 big buyers, will they be able to work with these firms to defeat
5 any price increase or threatened price increase by Wilhelmsen?

6 Now, a very important aspect of this chart, Your Honor, you
7 can see -- I'll try to keep my voice up. If I don't, I'll
8 return. You see the asterisks. The asterisks indicate firms
9 that the FTC has agreed, in interrogatories and in its expert
10 materials, are already competing in the market that the
11 government has alleged.

12 So these aren't hypothetical. We're not coming to the
13 Court saying there might be people who are not in the business
14 that will get in it. We're really saying that there are people
15 in the business, they've been in it for a while, and they're
16 going to take any opportunity they can to get bigger.

17 Now, what are these categories? The global distributors --
18 and you see Drew Marine's name on there. Those are the
19 companies that look most like Drew. They don't make much in the
20 way of product. They're distributors and they have global
21 networks and they specialize in the marine industry.

22 And again, every one of those has an asterisk because every
23 one of those, the FTC agrees, is currently competing for the
24 business of global fleets.

25 Global manufacturers, that's a slightly different category.

1 These are the folks that make the chemicals that the people on
2 the right distribute. So Drew Marine doesn't -- it's not a
3 chemical manufacturer. We buy chemicals from chemical
4 companies, and then we package it and we sell it. And sometimes
5 the people we buy from do the packaging for us.

6 So there's a firm on there called Solenis. Solenis is a
7 company -- it's a global company. They have chemical
8 manufacturing operations in Houston. We buy product from
9 Solenis and then we distribute it. On several continents, we're
10 simply buying product from chemical manufacturers who can sell
11 for anybody else. They can make it for any one of these firms
12 up here. And we're reselling.

13 Now, you'll hear in Singapore we do some blending.
14 Blending is exactly what you would think. We buy some
15 chemicals, and then we mix it up. But there's no heating.
16 There's no chemical reaction that's going on. We're not a
17 chemical company. So in Singapore we do some blending.
18 Everywhere else in the world, we simply buy from other chemical
19 manufacturers.

20 Chevron Marine, kind of a hybrid. Because Chevron is a
21 chemical manufacturer, but they also distribute directly their
22 cooling water treatment products at -- they offer it at 500
23 ports around the world.

24 And so we'll be talking about these two different
25 categories of participants in industry. But one thing that's

1 not in dispute -- there's no allegation in this case, like there
2 is in some antitrust cases, that supply is going to be
3 restricted. Drew doesn't control the supply of water treatment
4 chemicals. Wilhelmsen doesn't control the supply of water
5 treatment chemicals. And the FTC doesn't allege that anybody is
6 going to be able to control supply going forward.

7 Global testing equipment manufacturers -- around the chart
8 here, Your Honor. So these are three companies that make
9 testing and dosing equipment. As with chemicals, Drew doesn't
10 make any equipment. We don't make the test kits. We don't make
11 the dosing equipment. We're not a manufacturer. We buy,
12 principally from Hach and from the Parker firm there -- and
13 again, these are global companies, so we can buy all over the
14 world, have them shipped to our distribution points and then
15 sold.

16 Those companies are free to make equipment for anybody on
17 that board. And there are times -- and it happens when these
18 global testing equipment manufacturers just sell directly to the
19 big fleets. So the testing equipment, it's commodity stuff,
20 it's readily available, no shortage in supply of equipment.

21 And then one more set of players on the board, Your Honor,
22 the global general suppliers. I'm not going to spend a lot of
23 time here. But the point is, if you're a firm that wants to
24 expand globally -- say you want to open up a port -- a delivery
25 spot in Rio de Janeiro. Do you have to buy a warehouse in Rio?

1 You could. Do you have to rent a warehouse in Rio? You could.
2 Do you have to hire employees in Rio? You could. But there's a
3 huge global industry that facilitates distribution to the marine
4 industry.

5 So you can go to these -- you can call them chandlers,
6 sometimes we'll call them third-party logistics firms -- and
7 there's a lot of them. And you can go to them and say, help me
8 serve customers in Rio. And they say, okay, we'll rent you
9 warehouse space. Our employees will watch the warehouse. Our
10 employees will make that last-mile delivery to the vessel. You
11 don't need to have anyone on the ground.

12 That's not hypothetical, Your Honor. Drew Marine operates
13 81 stocking points, collecting stuff that they can then
14 distribute to different ports. 81 stocking points in the world.
15 74 are done through third-party logistics firms. No Drew
16 employees, no Drew warehouse, not even a Drew leased warehouse.
17 You simply pay as you go. If I ship stuff for you for you to
18 distribute, then I will pay you.

19 It's a very efficient, and as you'll hear from the
20 economist, it's a very low-cost way to distribute. There are no
21 barriers to entry n distribution in this business. So even
22 though we have several who have -- as Mr. Roush pointed out, who
23 have large distribution networks already, to expand them is
24 absolutely an -- there is no meaningful antitrust barrier to
25 expansion of distribution networks. And you won't hear

1 otherwise from the FTC.

2 So the global fleets can work with these firms, many of
3 whom they already work with, to keep prices competitive. So
4 here's what we've got, Your Honor. With multiple competitors
5 looking to grow, we have an abundant supply of chemicals, we
6 have global distribution networks that are easy to expand, and
7 we have a sophisticated, tough set of buyers that the government
8 has defined as the relevant market, the big global fleets.

9 It simply doesn't add up to an antitrust problem.
10 Competition is going to win out here. Monopoly pricing is going
11 to fail.

12 Now, one thing about Drew's -- if -- that first slide we
13 had up there, that \$22.6 million in global fleet sales, you
14 won't hear much from the government about, well, what do you
15 sell to global fleets in the United States? What do you deliver
16 at U.S. ports that goes to global fleets? It's less than
17 \$3 million, Your Honor. Less than \$3 million. So we're talking
18 both about substantial lessening of competition and we're
19 talking about this other issue: What would it take to replace
20 Drew? 22.6 million globally, \$3 million in the United States.

21 So we've talked about distribution. There was another
22 alleged barrier to entry that was mentioned in the government's
23 opening, and it's service; it's service technicians that work
24 for us. And if a ship is in port, we might visit the ship to
25 give advice on -- if the crew has questions or to show them how

1 to use our chemicals, and never charge for these services. We
2 do not charge for our technicians.

3 Globally -- globally, Drew employs fewer than 45 service
4 technicians. There's one in India, there's one in Canada,
5 there's two in Korea, eight in China, nine in the U.S. And
6 there's no allegation in this case, none, that the inability to
7 hire service technicians is a meaningful barrier to entry.
8 You're just not going to hear that from the government.

9 Most of these people -- some have college degrees, some
10 have degrees that they earned through shipboard experience, a
11 degree in life, so to speak, Your Honor, but there's no
12 allegation that there's a shortage of service capabilities for
13 any of these firms. And they already have service networks.

14 So in his deposition, which only occurred last Thursday,
15 Your Honor -- so the briefs don't have references to the expert
16 depositions, as they sometimes might -- we asked Dr. Nevo a
17 question -- questions about the technical service barriers. And
18 we see some of his answers on the screen.

19 Is there a shortage of service?

20 No. I don't know one way or the other.

21 Have you determined whether in any country or part of the
22 world there's a shortage of service technicians?

23 I haven't studied that question one way or the other.

24 We then asked him, have you studied -- this is a critical
25 question. If you're going to allege a service barrier, have you

1 studied whether a competitor of Wilhelmsen that wanted to expand
2 would face a barrier in the form of inability to find service
3 technicians?

4 And the answer is, I haven't looked at it. I just haven't
5 studied the individual barriers.

6 So the next question was, have you made any effort to study
7 the availability of technical services around the world? Do you
8 know what's out there?

9 The answer is, I have not, no.

10 So when you hear witnesses questioned about service
11 capabilities and service components of the business they do at
12 Drew, keep in mind that their expert declined to look at service
13 as a barrier to entry. And this is a pattern that repeats
14 itself -- Your Honor, just plainly, repeats itself in Dr. Nevo's
15 testimony over and over, an absence of analysis, an absence of
16 evidence.

17 We asked him -- I'll change topics, Your Honor. We asked a
18 question about power buyers of Dr. Nevo. Now, power buyers and
19 whether the fleets that belong to the market the government has
20 alleged, are they power buyers? If you look in the merger
21 guidelines, there's a whole section on power buyers. Section 8,
22 I think, in the merger guidelines. And why do we care about
23 power buyers in the antitrust analysis?

24 The fundamental inquiry the Court is being asked to make is
25 how much power will the sellers have after the merger and how

1 much will they have over the buyers?

2 So sometimes, if you have power buyers, the Court says,
3 yeah, there's going to be some increase in seller power here,
4 but it's not going to be at a point where these power buyers
5 have to worry about sellers extracting monopoly prices.

6 So I asked Dr. Nevo, So as you sit here today -- and it's
7 on the screen, Your Honor -- do you have an opinion as to
8 whether the global fleets, individually or collectively, could
9 be characterized as power buyers, correctly characterized as
10 power buyers?

11 Answer: I'm not offering an opinion on that.

12 Question: Well, is Maersk? Maersk is one of the largest
13 global fleets in the world. Are they a power buyer?

14 I have not looked at them individually.

15 Teekay. Teekay is going to be the first witness at this
16 hearing. Did he look to see if an economic analysis would
17 suggest that Teekay is a power buyer?

18 Same answer -- answer: Same answer. Which is no.

19 So there hasn't been any effort by the FTC to grapple with
20 what I think has been a critical issue from day one, the power
21 buyer issue. There hasn't been an effort to grapple with
22 service barriers to entry, which has been out there -- you can
23 look in their complaint, and they make reference to service as a
24 necessary component of what's supplied.

25 You're going to see in distribution question after question

1 Dr. Nevo was asked about his analysis of distribution barriers.
2 And you're going to hear, I didn't look at that.

3 Did you see -- does American have a sufficient distribution
4 network?

5 I didn't look at that.

6 How about -- did you identify any, any of those firms as
7 having an insufficient distribution network?

8 No.

9 Did you examine what it would take to build out the
10 network?

11 No.

12 Now, our point is this -- and it's not personal,
13 Your Honor. I know Dr. Nevo. I sat next to him at the
14 antitrust division of the Justice Department when we worked in
15 government together. It's not personal. But the absence of
16 analysis, the absence of evidence is not itself evidence.
17 Argument cannot substitute, allegations cannot substitute for
18 evidence, and that is going to be a big thrust of our case.

19 I've got one more point to make. In the reply brief that
20 was filed last week -- last Friday, I guess it was, the FTC for
21 the first time raised the issue of these two other agencies that
22 are out there looking at this deal. Just for the record, the UK
23 authority decided not to proceed. The transaction has been
24 cleared in the UK. And I want to be -- go easy here,
25 Your Honor, but they don't mention that in their papers, and

1 they don't mention it today. They raised the UK, but they don't
2 point out that investigation is over.

3 Singapore. Provisional. We're talking to the Singapore
4 authorities. We're doing what the Court might expect we would
5 do; we're trying to resolve the issue. But certainly the FTC
6 does not believe -- certainly they don't believe that what's
7 going on in these other agencies is evidence in this proceeding.
8 It can't possibly be evidence. So why, at the 11th hour, do
9 they raise it? I don't know. I can't speak for them on that.

10 As for WSS and Drew, Your Honor, this courtroom -- this
11 courtroom is the only judicial forum where the actual evidence
12 will be heard and evaluated, and we really welcome and
13 appreciate the opportunity to do that, Your Honor. Thank you.

14 THE COURT: Thank you, Mr. Ryan.

15 Mr. Dillickrath, are you ready for your next witness?

16 MR. DILLICKRATH: Yes, Your Honor. My colleague,
17 Llewellyn Davis, will examine the first witness.

18 THE COURT: All right.

19 MR. DAVIS: Llewellyn Davis for plaintiff, Federal
20 Trade Commission. Plaintiff calls Mr. Rob Sarro to the stand.

21 ROB SARRO, WITNESS FOR THE PLAINTIFF, SWORN

22 DIRECT EXAMINATION

23 BY MR. DAVIS:

24 Q. Good afternoon, Mr. Sarro.

25 A. Good afternoon.

1 Q. Could you please state and spell your name for the record.

2 A. Rob Sarro. Last name is spelled S-A-R-R-O.

3 Q. Who is your current employer, Mr. Sarro?

4 A. Teekay Corporation.

5 Q. And what does Teekay do?

6 A. Teekay provides marine transportation for crude oil,
7 liquified natural gas, marine products, that sort of stuff.

8 Q. As part of that marine transportation business, do you
9 operate a fleet of vessels?

10 A. Yes, we do.

11 Q. And where in the world do those vessels travel, Mr. Sarro?

12 A. They travel to every continent with the exception of
13 Antarctica.

14 Q. And approximately how many vessels are in Teekay's fleet?

15 A. Approximately 200.

16 Q. What kind of vessels are in Teekay's fleet?

17 A. So we -- the main breakup is we've got crude oil tankers,
18 LNG carriers, which is liquified natural gas, and then we have
19 some specialty vessels, which are called FPSOs, FSOs.

20 Q. And could you give us an idea, approximately how large are
21 these vessels?

22 A. In layman's terms -- we characterize them in gross weight
23 tonnage, but -- so, like, a gross weight tonnage would be about,
24 you know, 100,000 gross weight tons to, you know, over 200,000.
25 But in relative terms, it's the size of maybe two football

1 fields in lengths.

2 Q. And how much generally does a vessel like that cost?

3 A. Well, it depends on the type of vessel. So if it's a
4 tanker, it would be in the 50, 60, \$80 million. And if it's an
5 LNG carrier, it's in excess of 200 million.

6 Q. What kind of customers charter Teekay's vessels?

7 A. So our main customers are the oil majors, they're national
8 oil companies, they're energy traders. That sort of stuff.

9 Q. And what types of charters do you offer to oil majors and
10 these energy companies?

11 A. So, basically, our charters break up to two different
12 types. There's like, a spot charter and a time charter.

13 Q. In a given year, how many ports do Teekay's vessels travel
14 to?

15 A. In excess of 100.

16 Q. In what continents are those ports located on, sir?

17 A. Every continent with the exception of Antarctica.

18 Q. And just a moment ago you mentioned the term spot charter.
19 Could you briefly explain what a spot charter is?

20 A. So a spot charter is -- we call it tramping or, if I were
21 to use an equivalent, it would be like a taxi. So that is on a
22 charter day-to-day basis, so every day we're subject to a
23 different, you know, requirement, whatever the market is
24 bearing --

25 THE COURT: Excuse me. Mr. Llewellyn [sic], are you

1 going to be using slides on the screen?

2 MR. DAVIS: I am not.

3 THE COURT: Okay.

4 BY MR. DAVIS:

5 Q. And when you're chartering on that day-to-day basis, what
6 are the rates that Teekay might charge a customer?

7 A. Well, it's market-dependent. Right? So what ends up
8 happening is -- I mean, the range can go anywhere from 8,000 a
9 day to in excess of 50,000 a day.

10 Q. And --

11 THE COURT: I'm sorry. Your name is Mr. Davis, not
12 Mr. Llewellyn.

13 MR. DAVIS: That's fine, Your Honor. Thank you.

14 BY MR. DAVIS:

15 Q. When Teekay's vessels are operating on a spot charter, how
16 predictable is where they're traveling to?

17 A. Well, it's quite unpredictable, actually, because it's
18 subject to the market conditions. So whatever charter we pick
19 up at the time -- you know, that's what ends up happening. And
20 it's on a per-voyage basis, is whatever it is. So whatever it
21 would be where we're loading, and then we have to discharge.
22 And that's how it works.

23 Q. Do you know necessarily which port a spot charter will call
24 in from month to month?

25 A. No.

1 Q. Turning to your background, Mr. Sarro, how long have you
2 worked at the Teekay Corporation?

3 A. 16 years.

4 Q. And what's your current title?

5 A. Director of global procurement.

6 Q. And how long have you been in that position as the director
7 of global procurement?

8 A. Since 2006.

9 Q. What are your main responsibilities as the director of
10 global procurement at Teekay?

11 A. So my responsibilities is to negotiate and secure
12 agreements for the supply of products and services to support
13 the operations, not only the corporation, but the operations as
14 well.

15 Q. And what are the main types of products and services you
16 secure for Teekay?

17 A. So there's corporate stuff that we'll do, and then we talk
18 about spares and repairs, and then we call consumables.
19 Broadly, that's what we talk about.

20 Q. What's a consumable?

21 A. A consumable item is something that you consume. Right?
22 So it's used and it's replenished on a regular basis.

23 Q. And what are the main type of consumables that you're in
24 charge of procuring?

25 A. So marine lubricants, coatings, chemicals, gases,

1 provisions, food for vessels, all that stuff.

2 Q. And you mentioned chemicals. What are the main types of
3 chemicals that you're in charge of procuring?

4 A. So the main types of chemicals are cleaning chemicals,
5 they're water treatment chemicals, they're fuel treatment
6 chemicals.

7 Q. And those are consumable items?

8 A. Correct.

9 Q. How long have you been involved in procuring marine
10 chemicals for?

11 A. Since the beginning.

12 Q. Does anyone in your department support you in procuring
13 marine chemicals?

14 A. Yes, they do. So our department is broken up. We have --
15 I lead the department, and then I have a number of commodity and
16 contract specialists. And each of them have an assignment on
17 what they deal with, so a certain commodity. So I do have
18 somebody specifically for this group.

19 Q. And so how do they support you in procuring marine
20 chemicals?

21 A. Well, it's their responsibility -- they're the specialists,
22 so it's their responsibility to know the product -- know the
23 product, know the environment, know the -- you know, the
24 supplier community, all of that stuff. That's how they --
25 that's their expertise.

1 Q. And outside of your department, is there anybody at Teekay
2 that supports you in procuring marine chemicals?

3 A. Yes.

4 Q. And how is that support given to you?

5 A. So basically, we have -- the people within my department
6 are the commercial aspect of it, and then we have technical
7 representation that -- that's not only from the fleet teams
8 themselves, but on an office-by-office perspective.

9 Q. Who is Teekay's primary supplier of marine chemicals?

10 A. Wilhelmsen.

11 Q. And does Teekay have a contract with Wilhelmsen?

12 A. Yes, we do.

13 Q. What's your role in negotiating Teekay's contract with
14 Wilhelmsen?

15 A. So, ultimately, my role is to negotiate the contract, the
16 ultimate contract.

17 Q. What are the main categories of products that are included
18 in Teekay's contract with Wilhelmsen?

19 A. So, broadly, we call them chemicals, gases, and then, like,
20 welding supplies and equipment and stuff like that.

21 Q. And what services are covered under that contract with
22 Wilhelmsen?

23 A. Yeah, so related to the chemicals themselves, then we have
24 technical services that's involved with it. So the -- you know,
25 they're specialty chemicals, so we need their service to be able

1 to provide us with guidance on how, you know, to maintain the
2 equipment that they're being used on.

3 Q. What capabilities does Teekay seek in a marine chemical
4 supplier?

5 A. Well, generally, you know, capabilities is always the
6 same -- we call them the five rights. Right? So it has to be
7 the right product, the right quality, it has to be the right
8 supplier, has to be the right delivery, and then finally it has
9 to be the right price. So broadly, that's how we do it.

10 Q. In terms of delivery, what does Teekay look for?

11 A. Well, the capability, not only -- you know, they have to be
12 able to deliver where and when we need it. Right? So that's
13 paramount. Because of the way our ships trade, we have to have
14 the ability to get supply, because safety is job one for us. So
15 we have to have that ability and access.

16 Q. And where do you need a supplier to be?

17 A. Sorry?

18 Q. In what locations would you need a supplier to be at?

19 A. Every potential port that we're traveling to and we're
20 working out of.

21 Q. What suppliers have proved their capability of meeting
22 Teekay's need for marine chemicals?

23 A. Well, there's only two. Basically, Wilhelmsen and Drew.

24 Q. Turning your attention to water treatment chemicals, have
25 you ever heard of engine cooling water treatment chemicals?

1 A. Yes.

2 Q. And, briefly, what are engine cooling water treatment
3 chemicals?

4 A. So they work towards, you know, cooling the engine. So
5 what it is is it's an integral part of the operations to make
6 sure that we don't have any, you know, build-up and -- just has
7 to be safe and efficient operation.

8 Q. Does Teekay using engine cooling water treatment in --

9 A. Yes, we do.

10 Q. And why do you do that?

11 A. For those reasons that I stated.

12 Q. Do you know what types of things can happen if you don't
13 use engine cooling water treatment?

14 A. Well, it could render the vessel inoperable. So again, for
15 us, it's about safety. Right? The safe operation. So we have
16 to have that ability to operate safely.

17 Q. Who supplies Teekay's engine cooling water treatment?

18 A. Wilhelmsen.

19 Q. When your vessels replenish their stock of engine cooling
20 water treatment supply, what supplier of engine cooling water
21 treatment do they replenish with?

22 A. With Wilhelmsen.

23 Q. And how often do your vessels replenish their stock of
24 engine cooling water treatment?

25 A. Well, we'd like to see them do it every quarter, on a

1 quarterly basis, but it's usually every couple of months that
2 we're getting supply.

3 Q. Why do your vessels use the same supplier of engine cooling
4 water supplier when they replenish?

5 A. Because we need consistency of supply. We need to have not
6 only consistency of supply, but when you have consistency of
7 product, it has to be the same. We don't want to mix product.

8 Q. Why don't you want to mix product?

9 A. Because it's -- it's for the safe operation of the vessel,
10 we do not want to introduce any risk into the vessel, and that's
11 why we do that.

12 Q. What would a given Teekay vessel do if it was going to
13 switch from using Wilhelmsen's engine cooling water treatment to
14 a different brand of engine cooling water treatment?

15 A. Well, there would have to be somebody who can prove that
16 they can supply not only the product, the quality -- all the
17 five rights that I talked about. Right? So it has to be a
18 consistent product, it has to be, you know, a quality product,
19 it has to meet our needs.

20 Q. Turning your attention to boilers, what are boilers used
21 for on vessels?

22 A. So for Teekay, we've got two instances where the boilers
23 are really prevalent, if you will. So we have certain LNG
24 vessels that are actually used for propulsion. So the steam
25 that's produced off of the boilers actually run the ships.

1 And then for our tanker fleet, they're used to run all the
2 auxiliary machinery, so cargo pumps, cargo operations and
3 heating our cargo. So essentially they're critical -- mission
4 critical for our operations.

5 Q. You used the word LNG before. Could you explain what LNG
6 means?

7 A. So it's liquified natural gas.

8 Q. Have you heard of boiler water treatment chemicals?

9 A. Yes.

10 Q. Does Teekay use boiler water treatment chemicals on its
11 vessels?

12 A. Yes, we do.

13 Q. And who supplies Teekay's vessels with boiler water
14 treatment?

15 A. Wilhelmsen.

16 Q. When your vessels replenish their stock of boiler water
17 treatment, what supplier's boiler water treatment do they
18 replenish with?

19 A. Wilhelmsen.

20 Q. How often do your vessels replenish their stock of boiler
21 water treatment?

22 A. It's the same as the other answer, basically. We try to do
23 it all at the same time, and it's, you know, on a quarterly
24 basis, but it's really every couple of months.

25 Q. Why do your vessels use the same supplier of boiler water

1 treatment when they replenish?

2 A. Because, again, consistency of supply. We need to have the
3 right product, and it's got to be delivered, and -- it's quality
4 and product.

5 Q. What would a given Teekay vessel do if they were going to
6 switch to a different brand of boiler water treatment chemical?

7 A. Well, there would be -- we have to qualify that chemical,
8 first of all, to make sure that it meets the requirements. Sp
9 it's like -- you know, it's machinery. Right? And it has to be
10 right for purpose. And then we'd have to qualify the company as
11 far as being able to deliver and have the ability to deliver on
12 a consistent basis for us.

13 MR. DAVIS: Your Honor, I have a handful of questions
14 that I'd like to ask Mr. Sarro that have been designated as
15 confidential. If it's okay, I'd request if we could close the
16 courtroom for this.

17 THE COURT: Any objection?

18 Ladies and gentlemen, I am sorry to inconvenience you this
19 way. Obviously, the presumption is for open courtrooms whenever
20 possible, but we will have portions of the trial in which
21 there's confidential commercial information that will be
22 elicited. And so I'm going to have to close the courtroom
23 briefly.

24 How long do you think this will be, Mr. Davis?

25 MR. DAVIS: I think maybe about five minutes.

1 THE COURT: All right.

2 MR. DAVIS: And this will be the only portion.

3 THE COURT: All right. So anyone who is not with one
4 of the -- well, either with the FTC or with counsel for
5 Wilhelmsen or Drew Marine or Teekay is going to have to leave
6 the courtroom at this time. Again, we'll reopen in
7 approximately five to eight minutes. Thank you.

8 (Closed session.)

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11 THE COURT: All right. Thank you. Okay. We will
12 seal that portion, and we can reopen the courtroom. Thank you.

13 (Open court.)

14 THE COURT: You can proceed.

15 MR. DAVIS: Thank you.

16 BY MR. DAVIS:

17 Q. Mr. Sarro, approximately how many ports does Teekay buy
18 products from Wilhelmsen in in a given year?

19 A. It's in excess of 100.

20 Q. How about water treatment chemicals? How many ports does
21 Teekay buy water treatment chemicals from Wilhelmsen in a given
22 year?

23 A. Again, in excess of 100.

24 Q. Is Teekay required to buy anything from Wilhelmsen under
25 its contract?

1 A. Well, our contract is for them to supply our product and
2 services. It's not exclusive, but it is for that purpose.

3 Q. Under Teekay's contract with Wilhelmsen, does Teekay pay
4 different prices in different ports?

5 A. Yes, we do.

6 Q. How does Teekay's contract refer to those different ports?

7 A. So we call them A, B, and C ports.

8 Q. Can you explain what an A, B, and a C port is?

9 A. Yeah. So an A port is the most frequented ports. So these
10 are the ports that all shipping and merchant marine vessels
11 attend to. So a Singapore, Fujairah, Houston type thing.
12 Right? So they make up about maybe ten ports globally.

13 Q. And what's a B port?

14 A. A B port is -- tends to be ports that we -- are specific to
15 our trade and our requirements. So as a tanker, there's only
16 certain, you know, refineries and certain low ports and whatever
17 else that you would be going to. So that's what we would call a
18 B port or a secondary port.

19 Q. And a C port, what is that?

20 A. The rest of the world.

21 Q. Under your contract, how is the pricing different between
22 these ports?

23 A. So an A port is the best priced. And then, you know,
24 generally what we would say -- the B port is about 20 percent
25 premium on that. And then a C port is another 50 percent

1 premium on top of a B port.

2 Q. About what percent of Teekay's spend is in A ports?

3 A. About two-thirds.

4 Q. And what percent of Teekay's spend is in B ports?

5 A. So the remaining third is broken up. So I think our
6 percentage in B port is about 17 percent.

7 Q. And do you know what the remainder is in the C ports?

8 A. It's 20 percent. We actually spend more in C ports than
9 B ports.

10 Q. In a given year, does Teekay buy from every seaport that's
11 in your contract with Wilhelmsen?

12 A. Yes. Wilhelmsen supplies us completely.

13 Q. Why doesn't Teekay just buy everything in A ports?

14 A. We don't have the luxury of that.

15 Q. What do you mean that you don't have the luxury?

16 A. Because of the way our vessels trade, we can't always
17 ensure that we're going to be in an A port. So, you know, when
18 I talk about a spot charter and you're tramping all over the
19 place, you just don't know where you're going to be. So if we
20 could, we would lift always in an A port because it's
21 cost-advantageous for us.

22 Q. Why doesn't Teekay carry more product on board its vessels?

23 A. We don't have the luxury of space.

24 Q. Have you ever been on board any of your vessels?

25 A. Yes, I have.

1 Q. Have you ever seen where the vessels store water treatment
2 chemicals?

3 A. Yes, I have.

4 Q. Can you describe how large the storage area for water
5 treatment chemicals is?

6 A. So, I mean, if you can imagine, you know, when I describe
7 the size of two football fields, but we're only talking about a
8 20-by-20-foot section, because the vessels are optimized to
9 carry cargo, not supplies.

10 Q. I'd like to turn your attention to the tender process.
11 Does Teekay use a formal tender process?

12 A. Yes, we do.

13 Q. Can you give a brief description of what a tender is?

14 A. So a tender is a formal basis to go out for quotation for
15 products and services. And -- so it entails, you know,
16 researching product, researching companies, and then issuing it
17 on a formal basis and then going through the process of, you
18 know, final negotiations.

19 Q. And does Teekay issue tenders for marine chemicals?

20 A. Yes, we have.

21 Q. Are you personally involved in that process?

22 A. Yes, I am.

23 Q. What's your involvement?

24 A. My involvement is to negotiate the final agreement.

25 Q. Since 2006, when you became the global procurement

1 director, has Teekay issued a tender for marine chemicals?

2 A. Yes, we did.

3 Q. When was the first time you've done that since 2006?

4 A. It was 2009.

5 Q. Did Teekay review suppliers as part of that process?

6 A. Yes, we did.

7 Q. And what suppliers did you review?

8 A. So we reviewed Wilhelmsen, Drew, Nalfleet, and Marichem
9 Marigas.

10 Q. And out of those suppliers, which ones proved to have the
11 capabilities Teekay was looking for?

12 A. Only the three, which was Wilhelmsen, Drew, and Nalfleet.

13 Q. Who is Nalfleet?

14 A. Nalfleet has since been acquired by Wilhelmsen. So what
15 Nalfleet did is they would have -- together with Drew, they were
16 the only two suppliers that had proven high-pressure boiler
17 chemicals, and those are the boiler chemicals that are required
18 for LNG ships. Wilhelmsen has since acquired Nalfleet.

19 Q. Did you invite anyone to submit RFPs as part of this
20 process?

21 A. Yes, we did.

22 Q. And who did you invite?

23 A. We invited Wilhelmsen, Drew, and Nalfleet.

24 Q. And did you ultimately select a supplier as part of this
25 process?

1 A. Sorry?

2 Q. Did you ultimately select a supplier as part of this
3 process?

4 A. Yes, we did.

5 Q. And who did you select?

6 A. We selected Wilhelmsen and Nalfleet together.

7 Q. Okay. And why did you select those companies?

8 A. Because Wilhelmsen did not have the capability for
9 high-pressure boilers, and we needed high-pressure boilers. So
10 Nalfleet was successful for that aspect.

11 Q. You mentioned that you looked at Marichem in this process
12 too.

13 A. Yes, we did.

14 Q. Did you issue an RFP to Marichem?

15 A. No, we did not.

16 Q. Why not?

17 A. Because we assessed that they weren't capable to meet our
18 requirements.

19 Q. What do you mean that they weren't capable of meeting your
20 requirements?

21 A. They did not have the footprint. They did not -- when I
22 say footprint, they didn't have the capabilities in all the
23 ports that we required it, and they didn't have the technical
24 expertise that we deemed necessary to support us.

25 Q. Following the 2009 tender, when was the next time that

1 Teekay began the process of issuing a competitive tender?

2 A. It was 2013.

3 Q. As part of that process, did you review suppliers?

4 A. Yes, we did.

5 Q. And what suppliers did you review in that process?

6 A. At that point, then, we were left with Wilhelmsen, Drew,
7 and Marichem and Marigas.

8 Q. And what suppliers did you determine had the capabilities
9 Teekay was looking for?

10 A. The only two suppliers were Wilhelmsen and Drew.

11 Q. What was the ultimate outcome of this process in 2013?

12 A. So the ultimate outcome is we actually renegotiated or
13 negotiated a new agreement with Wilhelmsen without going out to
14 tender.

15 Q. You mentioned that you looked at Marichem in 2013?

16 A. Yes, we did.

17 Q. Were you personally involved in considering Marichem in
18 2013?

19 A. Yes, I was.

20 Q. What, if anything, did you do to evaluate Marichem's
21 capabilities?

22 A. So, you know, there's -- me personally or my team?

23 Q. Well, what are you aware of that was done to assess
24 Marichem's capabilities?

25 A. So again, my team -- that's their expert, is to know the

1 business, know the capabilities of the suppliers that are out
2 there and to qualify them. So we did -- and we met with them at
3 the time, too, because part of that process isn't just -- you
4 know, what you pick up in the industry is you've got to meet
5 with them and understand what it is that they're doing, how have
6 they changed, that sort of stuff.

7 Q. Were you at any of those meetings with Marichem?

8 A. Yes, I was.

9 Q. Do you know approximately how many times you would have met
10 with Marichem?

11 A. In 2013? Probably a couple of times, maybe, at the most.
12 It didn't take long.

13 Q. What did you learn regarding Marichem's capabilities?

14 A. Well, while they progressed from 20 -- you know, 2009, they
15 certainly did not, again, have the breadth to cover us and -- or
16 the expertise.

17 Q. Turning your attention from 2013 to more recent times, are
18 you aware that Wilhelmsen is proposing to acquire Drew?

19 A. Yes, I am.

20 Q. And when did you learn that?

21 A. It was last year, in the summertime or -- late spring,
22 early summer.

23 Q. Since the time that you learned about Wilhelmsen's proposed
24 acquisition of Drew, have you met with any marine chemical
25 suppliers?

1 A. Yes, I have.

2 Q. And what marine chemical suppliers have you met with?

3 A. I met with Marichem and Marigas.

4 Q. When was the first time that you met with Marichem after
5 learning that Wilhelmsen was proposing to acquire Drew?

6 A. It was in September of 2016 -- or 2017, sorry.

7 Q. And why did you meet with Marichem?

8 A. Because of this proposed acquisition, we needed to look at
9 our alternatives and see if we could have somebody viable to
10 step in and help.

11 Q. And what was discussed at that meeting?

12 A. So, again, what was mostly discussed was, you know, we
13 would explain to them what our requirements were, you know, the
14 ports that we're calling on, the service level that we're
15 looking for, and they provided us with their -- you know, their
16 progress, if you will, since the last time we met with them.

17 Q. And were there any outcomes at that meeting?

18 A. Well, one of the outcomes is we talked about potentially
19 doing a pilot with them to truly see if they were capable of
20 doing what they said they could.

21 Q. Have there been any follow-up meetings with Marichem about
22 doing a pilot?

23 A. Yes, there have.

24 Q. And when have those taken place?

25 A. Two earlier this year, on two separate occasions.

1 Q. And were you at those meetings?

2 A. Yes, I was.

3 Q. And what were the purpose of those meetings?

4 A. To actually see if we could plan out and do something like
5 this. Right? To do a pilot.

6 Q. What did you learn about the ability to do a pilot?

7 A. They're still not ready. By their own admission, they
8 don't have the -- you know, the capability in all the ports, and
9 they certainly don't have the service technicians to support us.

10 Q. What do you mean by they don't have the capability in all
11 the ports?

12 A. What typically happens in our industry, and probably a lot
13 of industries, everybody says they can do something, but then
14 when you come time to actually doing it [sic] and, you know,
15 putting pen to paper that you are going to be committed to doing
16 that, that's when we find out what their true capability is.
17 And at that point, they clearly said that they just weren't
18 there as far as the coverage.

19 Q. And what did you learn about their service capabilities?

20 A. They're very limited on their service capabilities. So
21 they're very limited in the people that they have. They
22 proposed using a lot of third-party service technicians, which
23 is a big red flag for us because we need people, you know,
24 standing behind their product and not relying on a third party
25 to step in to do service.

1 Q. Today, Mr. Sarro, what would it take for Teekay to shift
2 its entire vessel fleet to Marichem for boiler water treatment
3 and cooling water treatment?

4 A. We wouldn't do it.

5 Q. Why not?

6 A. Safety and reputational risk. We just cannot take that
7 risk.

8 Q. If the prices of boiler water treatment and cooling water
9 treatment with Wilhelmsen and Drew were to go up by 5 percent,
10 would you switch your entire fleet to Marichem's boiler water
11 treatment and --

12 A. Absolutely not.

13 Q. -- cooling water treatment?

14 A. Absolutely not.

15 Q. What if the prices of boiler water treatment and cooling
16 water treatment with Wilhelmsen and Drew went up by 50 percent,
17 would you switch your entire fleet to Marichem's boiler water
18 treatment and cooling water treatment?

19 A. We cannot take risks like that. Right? We just can't do
20 it because -- you know, free product even. If there's no
21 service behind it or if there's no consistency of supply, then
22 it's useless. It's worthless.

23 MR. DAVIS: Thank you, Mr. Sarro. I have no further
24 questions at this time.

25 Thank you, Your Honor.

1 THE COURT: Will you be examining this witness?

2 MS. SPILLMAN: Yes.

3 THE COURT: All right.

4 CROSS-EXAMINATION

5 BY MS. SPILLMAN:

6 Q. Good morning, Mr. Sarro.

7 A. Hello.

8 Q. I'm Fairley Spillman. Hopefully you remember me from
9 when I spoke with you in your office in Vancouver earlier.

10 A. I do.

11 Q. I want to start with a few questions about Teekay.

12 A. Sure.

13 Q. Teekay is one of the world's largest providers of
14 international crude oil and gas maritime transportation
15 services. Is that right?

16 A. Yes, it is.

17 Q. And Teekay manages approximately 13 billion in assets. Is
18 that right?

19 A. That is correct.

20 Q. And Teekay owns or operates approximately 200 vessels; is
21 that right?

22 A. That's correct.

23 Q. So Teekay is a big company. Is that right?

24 A. Yes, it is.

25 Q. And now just switching gears, I want to talk a little bit

1 more about your background. My understanding is that your
2 background and work experience is all on the procurement side.
3 Is that right?

4 A. Yes, it is.

5 Q. So you work from an office in Vancouver. You don't work on
6 board a ship. Is that right?

7 A. Not on board a ship, no.

8 Q. And in fact, you don't have any experience working on board
9 a ship, do you?

10 A. No, I do not.

11 Q. And you don't have any experience working in the technical
12 operations of vessels, do you?

13 A. No, I do not.

14 Q. And you personally have never used marine chemicals, have
15 you?

16 A. In the sense of applying them?

17 Q. Correct.

18 A. No, I have not.

19 Q. And you don't know -- sort of moving from that, you don't
20 know about how to dose marine chemicals, do you?

21 A. Not personally, but that's why we rely on our technical
22 teams to do that for us.

23 Q. And you don't consider yourself a technical expert in terms
24 of the use of chemicals in boilers, do you?

25 A. I'm certainly not an expert, but I know enough to get

1 around.

2 MS. SPILLMAN: I have one question following up to the
3 questions that cleared the courtroom about --

4 THE COURT: Oh. Does it pertain to this line of
5 questioning?

6 MS. SPILLMAN: I mean, I can hold it all the way to
7 the end. I think that will be okay.

8 THE COURT: Because you may have some more.

9 MS. SPILLMAN: Okay.

10 BY MS. SPILLMAN:

11 Q. All right. Now, you talked about learning about the
12 transaction in the summer?

13 THE COURT: You have to say yes.

14 THE WITNESS: Oh, I'm sorry.

15 THE COURT: No, it's perfectly natural to nod, but he
16 can't capture the nod.

17 THE WITNESS: Yes, it was. Midyear last year.

18 BY MS. SPILLMAN:

19 Q. And in connection with the transaction, you were contacted
20 by the FTC; is that right?

21 A. Yes, I was.

22 Q. And that was the first contact you had with the FTC. In
23 other words, you had not contacted the FTC about the
24 transaction.

25 A. No, I did not.

1 Q. And as far as you know, no one from Teekay had either. Is
2 that right?

3 A. That's correct.

4 Q. And you provided a declaration to the FTC in connection
5 with the transaction. Is that right?

6 A. Yes, I did.

7 Q. And the FTC drafted that declaration. Correct?

8 A. Yes, after some interviews.

9 Q. Okay. In your procurement role, you're responsible for
10 contracting all consumable items for vessels owned and managed
11 by Teekay, not just marine chemicals. Right?

12 A. That's correct.

13 Q. Internally at Teekay you called this kind of product
14 commodities. Is that right?

15 A. Well, we call it a consumable, but it is a commodity.

16 Q. Okay. And you contract with many suppliers other than
17 Wilhelmsen. Is that right?

18 A. For commodities and consumables, yes, we do.

19 Q. And suppliers want Teekay's business. Right? You're a big
20 customer?

21 A. We're an attractive customer. Yes, we are.

22 Q. You negotiate framework agreements for supply of marine
23 products for Teekay vessels. Right?

24 A. Yes, we do.

25 Q. But your department does not actually do the purchasing of

1 the product for particular vessels. Is that right?

2 A. No. So our group would -- we would negotiate the
3 agreements, and then we have day-to-day purchasers who do the
4 transacting of the --

5 Q. And as you mentioned in your direct testimony, your
6 agreement with Wilhelmsen is nonexclusive.

7 A. That is correct.

8 Q. And doesn't require Teekay to make any particular
9 purchases. Is that right?

10 A. That's not the intent of it.

11 Q. But that is correct, there is --

12 A. That's correct.

13 Q. -- no purchasing requirement?

14 And so the actual purchase of marine products is -- the
15 purchase decisions are made at the vessel level. Is that right?

16 A. The -- no. Well, no. Because we have a contract. So our
17 agreement is to honor the contract. So maybe just for clarity
18 purposes, the reason why they're not exclusive is because, for
19 the safe operations of the vessels, we need to get product if
20 there's ever a problem. So what we typically do is we have a --
21 you know, an out-clause -- right? -- whether it's 60 days, 90
22 days, or something like that.

23 So to answer your question, the expectation is that we
24 actually honor our contracts that we put in place.

25 Q. But --

1 THE COURT: I'm sorry. You said you have an
2 out-clause. So, for example, if for some reason you need a
3 particular product and you can't get it from Wilhelmsen, at that
4 point, you're allowed under the contract to go get it from
5 somebody else?

6 THE WITNESS: Yeah. For the safe operations of the
7 vessels, yes.

8 BY MS. SPILLMAN:

9 Q. Just to clarify, Mr. Sarro, you're not required to purchase
10 anything under the contract as far as Wilhelmsen can't require
11 you to go -- and insist that you purchase anything. That's
12 correct?

13 A. That is correct.

14 Q. And even within your framework of encouraging your vessels
15 to purchase under the contract, a particular vessel may, in
16 fact, purchase marine products from other suppliers. That's
17 correct?

18 A. It's possible, but I can't see why you would do that.

19 Q. It happens, doesn't it?

20 A. It can happen, again, if you can't get supply. Right? But
21 the whole point of having a contract is to get that consistency
22 of product. You're taking a risk if you're going to do it
23 outside. And I just don't think people take those risks.

24 Q. Well, you have a term you call leakage. Is that right?

25 A. Yes.

1 Q. And that's a term you use when vessels purchase outside the
2 contract. Correct?

3 A. Correct. But leakage applies to things that are --
4 something that you don't have to worry about. So let's say it's
5 a soap, a hand soap. That for us is what's real leakage.
6 Right? But when you're talking about boiler water chemicals,
7 that's not leakage. Right? That's -- you work through the
8 contract for that reason. Kind of like marine lubricants. We
9 don't have leakage in marine lubricants just because it's really
10 important that you have that product on board from that
11 supplier.

12 Q. I want to switch gears and talk a little bit about your
13 marine product agreements. I believe you said that Teekay has
14 essentially sole-sourced marine products from Wilhelmsen since
15 2003. Is that right?

16 A. That is correct.

17 Q. And consistent with your testimony when you were talking to
18 Mr. Davis, the last formal tender Teekay made for marine
19 products was in 2009. Is that right?

20 A. That's correct.

21 Q. And at that time, Wilhelmsen was selected.

22 A. That is correct. Wilhelmsen and Nalfleet.

23 Q. Right. And then, in 2013, an offer from Wilhelmsen was
24 negotiated without going to tender. Is that right?

25 A. That's correct.

1 Q. Okay. Now, I'm going to show you an exhibit.

2 MS. SPILLMAN: The exhibit, I think, is confidential,
3 but I don't believe the questioning is going to be.

4 THE COURT: All right. So we'll just put it up on
5 your screen.

6 If you could turn your screens away. Thank you.

7 MS. SPILLMAN: That's going to be DX-1297.

8 BY MS. SPILLMAN:

9 Q. Do you recognize --

10 A. It's very blurry. Like, I can't -- can you enhance it?

11 Yes. Yep.

12 Q. And if you can look at the next couple of pages. Look at
13 page DX-1297-0002.

14 A. 0002? Okay. Yes.

15 Q. And see if you can tell me what that document is?

16 A. So it's the agreement for -- between us and -- when I say
17 "us," there's a group called TBW and Wilhelmsen.

18 Q. And we'll get back to that in a minute.

19 A. Okay.

20 Q. Now I'd like you to take a look at a different document
21 that's marked DX-1299. Is that up on your screen?

22 A. Yes, it is.

23 Q. The next page of the exhibit. One more page.

24 And if you can identify the document that's DX-1299.

25 A. If you could just scroll down so I could see the bottom.

1 There's no marking on this document. Is it at the very bottom?

2 Q. Yeah. Keep scrolling down.

3 A. Sorry, yeah. DX-1299? Yep. Is there --

4 Q. I just wanted you to identify for the record what this
5 document is.

6 A. That is an agreement with Wilhelmsen again.

7 Q. And am I correct, DX-1299 is an addendum to the 2013
8 agreement, which was DX-1297. Is that right?

9 A. Correct.

10 Q. And -- so you effectively extended the 2013 agreement with
11 Wilhelmsen in 2016. Is that right?

12 A. Essentially.

13 Q. But there were some changes made at that time --

14 A. Yes.

15 Q. -- as well. And that's reflected in the addendum which is
16 DX-1299?

17 A. Correct.

18 Q. Okay. I'm going to ask you a few questions starting with
19 the 2013 agreement. So if you could turn back to DX-1297 and
20 take a look at page -0011 of the...

21 Now, this is schedule 2 of the 2013 agreement. Correct?

22 A. Yes.

23 Q. And if you look down towards the bottom, there's subpart A,
24 contracted items. Do you see that?

25 A. Yes.

1 Q. And then if we turn over to the next page, 0012, this
2 page -- and then we'll look at the next page in a minute --
3 these are the contracted items referred to on the previous page.
4 Is that right?

5 A. No, they're not, actually.

6 Q. What are these, then?

7 A. Well, these items -- so we have a list of products that
8 we've identified where we affixed the A, B, C ports. And these
9 are additional items that we contract that aren't
10 specifically -- so they may become a discount off of a port or
11 whatever it may be.

12 Q. Okay. Let's look at page 0014. Now, my understanding was
13 that these documents starting here at subpart B are the
14 noncontracted items.

15 A. Yes. So there's a couple of varieties of that. Right? So
16 these are noncontracted items. There are contracted items that
17 are within the agreement, but don't fall under a certain fixed
18 price for every single item. So then they become a discount off
19 a list.

20 There's other items, like the high consumable items, where
21 we actually negotiate the actual price. It isn't a discount off
22 a list. It's actually a price that we negotiate. So it's
23 rather complex, but that's why there's three aspects to it.

24 Q. Okay. I'm sorry to be confused here, but this page, 0014,
25 is titled, Noncontracted items.

1 A. That's right.

2 Q. Now, if you go back to 0011 and then follow on to 0012, it
3 would appear that starting at 0012 are contracted items.

4 A. Yes.

5 Q. Okay.

6 A. Yep.

7 Q. Okay. And those contracted items include a variety of
8 categories. Is that right?

9 A. Yes, they do.

10 Q. And that includes --

11 A. Sorry. Can you just scroll down on this sheet just a
12 little bit more? Okay. Perfect. Thanks.

13 Q. That includes welding consumables. Right?

14 A. Yes.

15 Q. Polymer repair systems. Right?

16 A. Yes.

17 Q. Gas welding cutting equipment. Right?

18 A. Yes.

19 Q. Electric welding equipment. Correct?

20 A. Yes.

21 Q. And then the next category is called chemicals marine. Do
22 you see that?

23 A. Yes.

24 MR. DAVIS: Would it be possible to share a document
25 with him so that he can actually see this?

1 MS. SPILLMAN: I think so.

2 BY MS. SPILLMAN:

3 Q. Okay. So turning back to page -- I think we're on
4 page 0012. And the page number is the DX -- it's the 12 after
5 the DX number.

6 A. Okay.

7 Q. And so I was just getting ready to ask you about the
8 category chemicals marine. Do you see that?

9 A. Yes.

10 Q. And that category, chemicals marine, includes boiling water
11 treatment. Correct?

12 A. Yes.

13 Q. And it includes cooling water treatment. Correct?

14 A. Yes.

15 Q. But it also includes a variety of additional marine
16 chemicals. Is that right?

17 A. That is correct.

18 Q. Then the next category, if -- I think you have to go over
19 to the next page -- is test kit. Do you see that?

20 A. Yes.

21 Q. And that includes water test kits.

22 A. Yes.

23 Q. And it also includes other kinds of test kits. Is that
24 right?

25 A. Yes.

1 Q. And, finally, there are two additional categories,
2 gas fillings and refrigerants. Do you see that?

3 A. Yes, I do.

4 Q. And then if you flip over to appendices 1 to 3, starting,
5 I think, on page 005 -- 0005 -- do you see those appendices?

6 A. No. The appendices are listed different than that. I
7 don't know which appendices you're referring to. Is it this?

8 Q. Yeah, that is it. I apologize, I'm sorry.

9 A. No worries.

10 Q. So if you could just explain what those appendices show.

11 A. The appendices show the specific products with the
12 discounts that are applied to those products, and the prices.

13 Q. And those appendices go on for page upon page. Is that
14 right?

15 A. Yes, they do.

16 Q. So there are a lot of different products covered by this
17 agreement. Would you agree?

18 A. Yes, there is.

19 Q. And in addition to contracting for many marine products in
20 a single agreement, Teekay actually purchases many marine
21 products from Wilhelmsen. Isn't that right?

22 A. Yes, we do.

23 Q. And in fact, isn't it the case that marine chemicals and
24 test kits of any kind make up just over a quarter of the total
25 purchases?

1 A. I don't know the actual figure.

2 Q. Okay. Let's take a look at a document that's been labeled
3 PX-40038, which again, I believe is confidential for Teekay.

4 Mr. Sarro, do you recognize document P-0038 -- PX-0038?

5 A. And can I just look at the bottom for the reference?
6 38-001?

7 Q. Correct.

8 A. Yes.

9 Q. And what do you recognize that document to be?

10 A. That is a document from the gentleman that works for me,
11 the commodity specialist, to Lew Davis.

12 Q. And you're cc'd on that document?

13 A. Correct.

14 Q. And is it correct to characterize this document as Teekay's
15 responses to some questions that the FTC posed?

16 A. Yes, it is.

17 Q. And if you look at page -- let's see. I'm sorry. I didn't
18 write it down. I'm sorry. I didn't write it down. It's, like,
19 the next page -- about three more pages. See if I can find it.

20 Yes -- no, that's not it, I'm sorry. It's the next
21 spreadsheet. That's it, yes.

22 If you look at this document, which is page 0009, am I
23 correct that's a breakdown of your spend for marine chemicals by
24 category? Is that right? I mean, your spend for marine
25 products by category.

1 A. Yes.

2 Q. And it shows -- keep scrolling down -- chemicals, 28
3 percent?

4 A. Correct.

5 Q. And in that category, you include chemicals, test kits and
6 equipment.

7 A. Correct.

8 Q. And that includes all marine chemicals, correct, not just
9 boiler water treatment and cooling water treatment?

10 A. I believe so. I'd have to scrutinize it completely, but
11 yeah, generally, it probably is.

12 Q. Okay. Now, looking back at DX-1297, the agreement, if you
13 look at page 0036 --

14 A. Yes.

15 Q. -- Mr. Sarro, can you tell me what that page shows?

16 A. That page shows the port price breakdown between A, B, and
17 the rest of the world.

18 Q. And you previously explained what's the difference between
19 an A port and a B port. Correct?

20 A. Yes, I did.

21 Q. And A ports are the ports most frequented by Teekay
22 vessels. Correct?

23 A. Correct.

24 Q. And Teekay gets a significantly discounted price for
25 purchases at A ports. Right?

1 A. It's the best port for us, yes.

2 Q. Now, if you turn your attention -- I'm sorry to do this --
3 to DX-1299. And I actually have a hard copy for you if that
4 will be easier.

5 A. Thank you.

6 Q. And if you'd turn to page 0013 of 1299.

7 A. Yes.

8 Q. Do you have that page?

9 A. Yes.

10 Q. And that's also a list of A ports and B ports?

11 A. Sorry, then. I don't have the same one. Which was the
12 page? I'm looking at 1299-0003.

13 Q. 13?

14 A. 13, I'm sorry.

15 Q. Yes.

16 A. Okay.

17 Q. And if you compare that to the comparable list -- this is
18 the list from the 2016 addendum. Correct?

19 A. Correct.

20 Q. And if you compare that to a list from the 2013 contract,
21 the upshot is that the number of A ports and B ports was reduced
22 in --

23 A. Correct.

24 Q. -- the 2016 amendment. Is that correct?

25 A. Correct.

1 Q. And the idea was that that would save Teekay money. Right?

2 A. Yeah. So what we were able to do is we were able to
3 pinpoint, you know, where our activity was. And so rather than
4 having more ships on certain A ports and B ports where we had no
5 activity, then it would incentivize Wilhelmsen to give us a
6 better price.

7 Q. Okay. Now, you testified earlier about Teekay's preference
8 that a marine products supplier have a broad distribution
9 network. But Teekay vessels don't actually purchase product in
10 every port in which they call. Correct?

11 A. Not every port, no.

12 Q. And going back to PX-40038, the Teekay answers to the FTC's
13 questions, if you look on page --

14 A. I think that has to come up on the screen.

15 Q. Yeah. Just a minute. Page 7.

16 Does this illustrate Teekay's purchases broken down by
17 port?

18 A. Yes. It does at that time.

19 Q. And do you know what time period this is from?

20 A. I'm pretty sure this is the 2013, '16, somewhere around
21 there. I'd have to look at the document to refresh.

22 Q. The first page?

23 A. Yeah. So if you bring up the first page, I think Jeff had
24 outlined what the date range was on that or when it was --

25 Q. Here it is.

1 A. Thank you.

2 (Witness reviewing document.)

3 So that would be for 2016.

4 Q. For 2016.

5 A. Correct.

6 Q. And does that show that, in 2016, 83 percent of all of the
7 marine product purchases that Teekay made were had made at A or
8 B ports?

9 A. Yes, it does.

10 Q. And with the exception of Lisbon, purchases at any other
11 port were less than 1 percent of the total. Is that right?

12 A. That is correct.

13 Q. And this reflects purchases of all products from Wilhelmsen
14 and Drew. Correct?

15 A. Yes, it does.

16 Q. So not just boiler water treatment products or cooling
17 water treatment products?

18 A. That's correct.

19 Q. And presumably you don't know what the breakdown is of
20 those product purchases?

21 A. No, I don't. But typically, when we're lifting at any
22 port, it's not just one item. Right? So we end up lifting more
23 items than that. And that's what ends up happening.

24 Q. Do you know what proportion of Teekay's vessels visit an
25 A port or a B port at least every six months?

1 A. I don't have that answer, no.

2 Q. Presumably, it's a pretty high number, given the breakdown
3 of purchases. Right?

4 A. We hope it is, but again, it's dependent on what the
5 charters and the -- the spot charter and where we're tramping
6 around. But that's the hope.

7 Q. Now, I think you mentioned, but if you didn't, I'll say
8 Teekay is in a purchasing group with a company called BW Fleets.
9 Right?

10 A. It's BW Fleet Managers.

11 Q. Fleet Managers.

12 A. Fleet Managers.

13 Q. And that's reflected in both the 2013 agreement and the
14 2016 addendum, in fact, that those are actually three-way
15 agreements?

16 A. That is correct.

17 Q. BW Fleet manages over 100 vessels. Is that right?

18 A. That is correct.

19 Q. And you believe that this contract arrangement where you
20 jointly contract with BW is advantageous to Teekay because it
21 increases your bargaining power. Correct?

22 A. You bet. Yes.

23 Q. In other words, it leverages the purchasing power of the
24 combined fleets. Is that right?

25 A. Yes, it does.

1 Q. It's your experience, isn't it, that a large volume
2 purchaser has leverage not just with respect to price terms, but
3 with respect to other terms and conditions?

4 A. That's the hope.

5 Q. And in fact, you believe Teekay gets better pricing even
6 than other big fleets. Is that right?

7 A. We believe we do, but a lot of that has to do -- it's not
8 just leverage; it's our ability to negotiate.

9 Q. So you think you're a particularly good negotiator?

10 A. I hope to -- I'm still employed, so that's good.

11 Q. Now, in your direct testimony, you spoke a little bit about
12 the importance that you perceive of boiler water treatment and
13 cooling water treatment. Is that right?

14 A. Yes.

15 Q. And risks associated with switching suppliers for those
16 products?

17 A. Yes.

18 Q. But you haven't actually personally had any experience
19 switching boiler water treatment chemicals, have you?

20 A. No, because we honor the contract.

21 Q. And you aren't aware of any instances in which equipment
22 has actually been damaged because of switching boiler water
23 treatment chemicals. Correct?

24 A. To the best of my knowledge, it hasn't occurred because we
25 haven't done it.

1 Q. And you aren't aware of any delays caused by switching
2 boiler water treatment chemicals?

3 A. Because we haven't done it.

4 Q. And I assume that's also true for cooling water treatment
5 chemicals. Correct?

6 A. That's correct.

7 Q. And you aren't aware of any instance where a Teekay vessel
8 has run out of boiling water treating chemicals.

9 A. I -- that -- I couldn't even answer that. But it's
10 entirely possible that we're out of chemicals and we have to get
11 it at the next port. And that's why maybe we -- you know, we're
12 lifting in some of these obscure ports -- right? -- because
13 literally we've lifted in over -- it's probably about 120-plus
14 ports, these products.

15 Q. I thought you said a hundred.

16 A. Over a hundred, I said. Literally, it's about 120-plus.

17 Q. But earlier you said Teekay vessels typically carry a
18 three-month, four-month supply of chemicals.

19 A. I never said how much we carried, because I don't know how
20 much we carry. But typically speaking, is we want to carry
21 enough that's going to carry us from quarter to quarter. But
22 all too often we're lifting every couple of months. We just --
23 we have limited space, so we don't have that luxury.

24 Q. Now, in your direct testimony, you testified that you would
25 not switch suppliers if faced with a price increase. Is that

1 right?

2 A. That's correct.

3 Q. And I believe -- well, let me show you a document, DX-1298.

4 THE COURT: Is this also subject to protection?

5 MS. SPILLMAN: I do not believe anyone designated this
6 confidential, but --

7 THE COURT: Speak now or it's going to be on the
8 public screen.

9 MS. SPILLMAN: For safety's sake, because I didn't get
10 a chance to talk to him about what he wanted confidential, so...

11 THE COURT: All right. Let's keep it out of the
12 public screen for now.

13 THE WITNESS: I would suggest we do that --

14 THE COURT: All right.

15 THE WITNESS: -- for this one.

16 BY MS. SPILLMAN:

17 Q. And can you identify the document that's been marked
18 DX-1298?

19 A. It's an internal communication within Wilhelmsen.

20 Q. Let's scroll down. Let me get you a hard copy of this one,
21 too. And once again, I apologize. From now on, I'll have hard
22 copies.

23 A. Okay. Thank you.

24 Q. Mr. Sarro, have you had a chance to look at that?

25 A. Yes, I have.

1 Q. And can you describe -- you described, I think, the top of
2 the first page of DX-1298. Can you describe the document more
3 broadly than that, seeing the whole thing in hard copy?

4 A. So this dates back to 2015 where we were negotiating the
5 agreement of -- the 2016 agreement. And we talk about
6 there's -- the internal communication -- well, it's an internal
7 communication document, but it shows communication between the
8 TBW group and Wilhelmsen.

9 Q. And so below that top e-mailed -- a series back and forth
10 of e-mails between or among Wilhelmsen, Teekay, and BW Fleet.
11 Is that right?

12 A. Correct. Well, it's really from BW and Wilhelmsen. It's
13 their document.

14 Q. But you're cc'd on the --

15 A. Yes, I am.

16 Q. -- e-mail exchanges --

17 A. Correct.

18 Q. -- correct?

19 A. Correct.

20 Q. And if you look at the bottom of the first page, page 001
21 of DX-1298 --

22 A. Yes.

23 Q. -- can you read the language in that message?

24 A. Do you want me to read it?

25 Q. If you could, yeah. Those two paragraphs after "Hi."

1 A. Okay. It says, As briefly mentioned over to the phone to
2 you, it has now been more than one full year since our meeting
3 in Singapore and, unfortunately, we're still at odds with your
4 proposal. If -- sorry. It wouldn't be fair to say -- sorry.
5 It's really small, so I'm -- wouldn't be fair to say that we are
6 no further ahead, as WSS has made some suggestions for overall
7 savings to the TBW members.

8 THE COURT: I think it's also on the screen. That
9 might --

10 THE WITNESS: Oh, perfect. Thank you very much.

11 The issues, however, remain the same. We're simply in no
12 position to absorb any increases on any products. Once again,
13 we appreciate there may be limits or -- sorry -- that items that
14 are in red for WSS. However, short of an open-book agreement,
15 we cannot accept this as the case. Again, we point to the
16 changes in the commodity prices and strength of the U.S. dollar
17 as crucial factors in costs for WSS.

18 BY MS. SPILLMAN:

19 Q. So in this e-mail, BW Fleet, on behalf of itself and
20 Teekay, is stating that they're in no position to absorb any
21 increases for any products. Is that correct?

22 A. Yeah. That's our negotiation tactic.

23 Q. And that's referring to price increases. Right?

24 A. Absolutely.

25 Q. And so it's the case that Wilhelmsen was proposing an

1 arrangement that would result in an overall decrease in costs to
2 Teekay and BW Fleet, but to raise prices on a few products
3 under -- covered under the agreement, and Mr. Gilliam was
4 telling Wilhelmsen that this was unacceptable. Is that right?

5 A. Yes. And we're trying to negotiate the very best possible
6 deal.

7 Q. And this approach is consistent with Teekay's day-to-day
8 focus on cost efficiencies which is applied to all aspects of
9 Teekay's operations. Is that correct?

10 A. Yeah. Absolutely. We are trying to negotiate the best
11 possible deals.

12 Q. And in fact, Teekay and BW Fleet were able to --
13 subsequently to this e-mail -- to negotiate a satisfactory
14 addendum to the agreement with Wilhelmsen. Correct?

15 A. Yes, we were.

16 Q. Now, in your direct testimony, you were talking a little
17 bit about Marichem, and you indicated that you believed that
18 they didn't have the service capabilities --

19 A. That is correct.

20 Q. -- that Teekay wanted. Now, if you look back at your
21 agreement, DX-1297, at page 19 -- do you have that?

22 A. Got it on the screen, yes.

23 Q. Okay. And that's schedule 3 of the 2013 agreement.
24 Correct?

25 A. Yes.

1 Q. And it's additional terms. And if you look at the very
2 bottom, number F, there's a reference to annual vessel visits?

3 A. Yes.

4 Q. And so that provision permits Teekay and BW Fleet one
5 free-of-charge chemical service visit per year for each vessel.
6 Do you see that?

7 A. Yes.

8 Q. So under your agreement, you're only entitled to one
9 onboard vessel -- one onboard visit per vessel per year.
10 Correct?

11 A. That's what we were able to negotiate, yes.

12 Q. And in fact, not even all Teekay vessels get that annual
13 visit. Isn't that right?

14 A. Because they can't schedule it. Right?

15 Q. Right.

16 A. But the scheduled visit is to physically go on board and
17 assess. Right? But there's constant communication back and
18 forth to ensure that we're following suit. Right? It's ship's
19 operation, so we do have communication and ability to
20 communicate.

21 Q. You've never participated in an onboard service at --

22 A. No, I have not.

23 Q. Do you know how often, say, boiler water is tested on a
24 Teekay vessel?

25 A. I can't answer that question, but it's fairly frequent.

1 Q. Do you know who does the testing?

2 A. The ship's staff.

3 Q. And you agree, don't you, that, ultimately, it's the ship
4 team, not the chemical supplier, that's responsible for water
5 treatment on a vessel?

6 A. On board the ship, it's -- they're ultimately responsible.
7 They're the last line of defense.

8 Q. Okay. And then just switching topics again -- or a little
9 bit -- in your direct testimony, I take it that you think that
10 no one other than Wilhelmsen, or potentially Drew, could serve
11 Teekay's needs. Is that right?

12 A. Yeah. Absolutely. And I should mention, when you talked
13 about, you know, Marichem, it isn't my opinions. They're the
14 ones who told us specifically this year that they just don't
15 have that capability. They'd like to try, but they'd like to
16 have targeted -- and we just don't have that luxury that we can
17 just help somebody along.

18 Q. Okay. It's true, isn't it, that Marichem said it would
19 expand its port coverage to serve Teekay?

20 A. As with many suppliers, they'll say they'll do that.

21 Right? But it's the cart before the horse. At the end of the
22 day, we're not -- they're not even going to make it past first
23 base if they don't have the capability. So we're not there to
24 help somebody along. We need a proven supplier.

25 Q. But they said they'd expand to serve you. Right?

1 A. Suppliers say a lot of things.

2 Q. They said that. Right?

3 A. Yes, they did.

4 Q. Now, one reason you prefer Wilhelmsen, and maybe Drew, is
5 that you want a supplier with a full range of marine products.
6 Is that right?

7 A. Yes.

8 Q. And that's desirable because you believe consolidating your
9 spend with fewer companies gives you more negotiating leverage.
10 Is that right?

11 A. Yes. And there's efficiencies in dealing with one
12 supplier. We've got -- if you can appreciate, we've got ships
13 that are going into port, and just to coordinate a supply in a
14 port is very difficult. So Wilhelmsen has that breadth.
15 They've got that product portfolio that works well.

16 Q. And that's why you negotiate over a whole basket of
17 products at the same time. Right?

18 A. Yes, that and our volumes.

19 Q. Now, talking about the 2013 contracting, you met with Drew
20 and Marichem, but you never solicited or received formal bids
21 from either of them. Isn't that right?

22 A. No. Not formal bids from either.

23 Q. And you ended up just renegotiating and reupping with
24 Wilhelmsen. Is that --

25 A. Correct.

1 Q. Now, other than Wilhelmsen, Drew, and Marichem, you haven't
2 investigated any alternative suppliers for water treatment
3 chemicals, have you?

4 A. Not generally. I mean, we have people that call upon us
5 from time to time. Like Uniservice is one of them, but that's
6 about the only people that will contact us.

7 Q. So you're not familiar with a company called Marine Care?

8 A. No, I am not.

9 Q. And you've heard of Uniservice, but you haven't personally
10 considered them as a supplier --

11 A. No, we would not consider them.

12 Q. And you're not familiar with a company called Bluetech?

13 A. No.

14 Q. And you're not familiar with a company called Vecom?

15 A. No.

16 Q. Two more questions. Then I'll get back to the secret
17 question. It's the case, is it not, that Teekay's operations
18 are primarily outside the United States?

19 A. We're global. So there is some operations in the U.S.,
20 but, yeah, we've got them throughout the world.

21 Q. But you would agree that the operations are primarily
22 conducted outside the United States?

23 A. Predominantly.

24 Q. And your office is in Vancouver, as we've talked about.
25 Teekay doesn't have any U.S.-flagged vessels, does it?

1 A. No U.S.-flagged vessels, no.

2 MS. SPILLMAN: Okay. Now I'm ready for the --

3 THE COURT: We're going to have to clear the courtroom
4 briefly. How many questions do you think you have?

5 MS. SPILLMAN: I think it's two, one or two.

6 THE COURT: So a couple of minutes. Thank you.

7 MS. SPILLMAN: And Drew has some questions, but...

8 THE COURT: Right. But do you have -- well, do you
9 have --

10 MS. SPILLMAN: I only have -- I have one or two more
11 questions.

12 THE COURT: And then will you be done?

13 MS. SPILLMAN: Then I'll be done.

14 THE COURT: And then do you all want to start with
15 your -- because how you proceed with your examination is up to
16 you, but...

17 MR. POTTINGER: Your Honor, if we could just break
18 for lunch, and then --

19 THE COURT: Okay. All right. So just a minute or
20 two, and then you can come back to for lunch.

21 (Closed session.)

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
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18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

MS. SPILLMAN: Okay. That's all the questions I have.

THE COURT: All right. Thank you, Mr. Sarro.

MS. SPILLMAN: Thank you, Mr. Sarro.

1 THE COURT: We can reopen the court.

2 (Open session.)

3 THE COURT: All right. Thank you. So let's break for
4 lunch. Here's what we're going to run up against. I have a
5 2:30 oral argument in a TRO motion. And we have to eat. And my
6 clerk has to prepare me for that one, which I'm kind of prepared
7 already, but -- so we can come back at 2:00 and do half an hour?
8 But you'll still have redirect. Right? How do you propose?
9 What do you want to do? Or we can have a longer -- you can have
10 a really long lunch.

11 MR. DILLICKRATH: Your Honor, Mr. Sarro, begging the
12 Court's indulgence, is trying to get back to Vancouver today, if
13 that's at all possible.

14 THE COURT: I don't blame you. Okay. So let's do
15 what we can. Let's get back -- if we have to break for the 2:30
16 hearing -- what time is your flight?

17 THE WITNESS: My flight is at 5:00, so --

18 THE COURT: Oh. Yeah, we really --

19 THE WITNESS: -- I need to -- if we could get through
20 this now, it would be great.

21 THE COURT: All right. My clerk is going to see if we
22 can move that to 4:00. Let's come back here at 2:15. Yeah,
23 2:15.

24 MR. DILLICKRATH: Thank you, Your Honor.

25 THE COURT: All right. I think we'll be able to move

1 it to 4:00. Were you leaving from Dulles?

2 THE WITNESS: Yes. Or, sorry, Reagan. Sorry, Reagan.

3 THE COURT: Better.

4 All right. Let's break for lunch. I'll have Mr. Bradley
5 or somebody tell you, but let's proceed under the assumption
6 that we're going to push that argument to 4:00. All right. So
7 let's get back here at -- did I say 2:15? Yes.

8 (Lunch recess taken at 1:13 p.m.)
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* * * * *

CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify
that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

Bryan A. Wayne
BRYAN A. WAYNE

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL TRADE COMMISSION, et al.,

Plaintiffs,

v.

THOMAS JEFFERSON UNIVERSITY, et
al.

Defendants.

CIVIL ACTION
NO. 20-01113

ORDER

AND NOW, this 10th day of September 2020, upon consideration of Defendants' Motion *in Limine* (ECF No. 132), their exhibits (ECF No. 135), and Plaintiffs' Response (ECF No. 166), it is **ORDERED** that the Motion is **DENIED**.¹

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

¹ Defendants seek to preclude Plaintiffs from offering declarations and third-party investigational hearing transcripts they obtained before filing their Complaint. Arguing the documents are hearsay, needlessly cumulative and controvert Federal Rule of Civil Procedure 43's preference for live testimony, Defendants ask the Court to refrain from exercising its discretion to consider them. (Def.'s Mot. at 2–4, ECF No. 132.)

The Court is not strictly bound by the Federal Rules of Evidence in a preliminary injunction proceeding. As both sides acknowledge, the Court may use its discretion to consider hearsay evidence in this context. *See Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 718–19 (3d Cir. 2004) (“District courts must exercise their discretion in weighing all the attendant factors, including the need for expedition, to assess whether, and to what extent, affidavits or other hearsay materials are appropriate given the character and objectives of the injunctive proceeding.”) (internal quotation marks and citation omitted). Given that part of the Court's role in the preliminary injunction proceeding will be to determine Plaintiffs' likelihood of success on the merits in the administrative adjudication, *see FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016), Plaintiffs may present declarations or investigational hearing transcripts that they may later introduce during the administrative adjudication. The parties are also entitled to examine live witnesses as they deem appropriate during the preliminary injunction hearing. The Court will evaluate and consider the live testimony and accompanying evidence and will give the weight it considers appropriate to any declarations or investigational hearing transcripts introduced into the record in the absence of a live witness.

Exhibit F

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

META PLATFORMS, INC.,

and

WITHIN UNLIMITED, INC.,

Defendants.

Case No. 5:22-cv-04325-EJD

**JOINT STIPULATION AND ~~[PROPOSED]~~
ORDER REGARDING DOCUMENTS
ADMITTED INTO EVIDENCE**

1 Plaintiff Federal Trade Commission (“FTC”) and Defendants Meta Platforms, Inc. and
2 Within Unlimited, Inc. (collectively, “the Parties”) submit the following Joint Stipulation and
3 request that the Court admit into evidence the documents listed in Exhibit A attached hereto:

4 **WHEREAS** on December 1, 2022, the Parties filed a Joint List of Stipulations and
5 Issues for Pre-Hearing Conference (Dkt. No. 385);

6 **WHEREAS** the Court held a preliminary injunction hearing that commenced on
7 December 8, 2022 and concluded on December 20, 2022;

8 **WHEREAS** the Court admitted numerous documents into evidence during the
9 preliminary injunction hearing;

10 **WHEREAS** the Parties’ Joint List of Stipulations and Issues for Pre-Hearing
11 Conference (Dkt. No. 385) stated that the Parties agreed “that all evidence previously filed in
12 connection with their pre-hearing submissions regarding Plaintiff’s Motion for a Preliminary
13 Injunction, proposed Findings of Fact and Conclusions of Law, and expert reports can be
14 considered as evidence by this Court, irrespective of its introduction as evidence at the hearing,
15 subject to Plaintiff’s Motion in Limine (Dkt. 280) and any objections that the parties may lodge
16 during the hearing proceedings”;

17 **WHEREAS** in addition to the categories of documents listed in the Parties’ Joint List
18 of Stipulations and Issues for Pre-Hearing Conference (Dkt. No. 385), the Parties have agreed
19 that select other documents may be admitted into evidence;

20 **NOW, THEREFORE**, the Parties hereby stipulate and request that the Court admit
21 into evidence the documents listed on the attached Exhibit A, all of which documents are
22 described on Plaintiff’s Amended Exhibit List (Dkt. No. 458) or Defendants’ Fourth Amended
23 Exhibit List (Dkt. No. 455) or, in the case of demonstratives, were presented in open court
24 during the preliminary injunction hearing.

IT IS SO STIPULATED.

Dated: December 21, 2022

Respectfully submitted,

/s/ Abby L. Dennis

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Joshua Goodman
Jeanine Balbach
Michael Barnett
E. Eric Elmore
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FILER'S ATTESTATION

I, Abby L. Dennis, am the ECF User whose ID and password are being used to file this JOINT STIPULATION AND [PROPOSED] ORDER REGARDING DOCUMENTS ADMITTED INTO EVIDENCE. In compliance with Civil Local Rule 5-1(h), I hereby attest that concurrence in the filing of this document has been obtained from each of the other signatories.

By: /s/ Abby L. Dennis

Abby L. Dennis

1 *This order has been entered after consultation with the parties.* PURSUANT TO
2 STIPULATION, IT IS SO ORDERED:

3
4 Dated: December 22, 2022



Honorable Edward J. Davila
United States District Judge
Northern District of California

Exhibit G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	No. 5:24-CV-28
)	
vs.)	
)	
NOVANT HEALTH, INC., and)	
COMMUNITY HEALTH SYSTEMS,)	
INC.)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE KENNETH D. BELL
UNITED STATES DISTRICT COURT JUDGE
APRIL 24, 2024

APPEARANCES:

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Cheryl A. Nuccio, RMR-CRR
Official Court Reporter
United States District Court
Charlotte, North Carolina

P R O C E E D I N G S

THE COURT: All right. Thank you all for being here.

At 5:00 last night I was told by defense counsel that there would be several days of defense evidence, and I was worried that we would even be through by our new May 1st date. 8:00 this morning I was told no defense evidence. And so knowing the importance of having this hearing so that -- because I know you need to plan for things, I scheduled this. I know it's not convenient for you time, place, or any other reason, but I appreciate you indulging me on this.

If counsel would please introduce themselves to me. You may have to do it more than once because I'm terrible with names.

MR. BRENNER: Good afternoon, Your Honor. Nathan Brenner for the Federal Trade Commission.

THE COURT: That will be easy to remember because my law clerk, Mr. Brenner, has a son named Nathan. So you I will remember.

MR. BRENNER: No relation as far as I know.

MR. STEBINGER: And, Your Honor, Nicolas Stebinger for the Federal Trade Commission.

THE COURT: Pardon me, sir, I couldn't hear you.

MR. STEBINGER: Nicolas Stebinger.

MS. HUNT: And Karen Hunt for the Federal Trade

1 Commission.

2 THE COURT: Yes, ma'am.

3 MS. HUBBARD: Good afternoon, Your Honor. Heidi
4 Hubbard from Williams & Connolly. I'm counsel for Novant
5 Health.

6 MS. STEWART: Good afternoon, Your Honor. Beth
7 Stewart from Williams & Connolly. Also counsel for Novant
8 Health.

9 MR. CROMWELL: Good afternoon, Your Honor. Brian
10 Cromwell from Parker Poe. Local counsel for Novant Health.

11 THE COURT: Your name I'll also remember.

12 MR. DOERR: Good afternoon. Adam Doerr with
13 Robinson Bradshaw for CHS.

14 MR. PERRY: Good afternoon, Your Honor. Michael
15 Perry from Gibson Dunn for CHS.

16 THE COURT: And I think we have two or three remote
17 participants who are just listening in, as I understand it.
18 We declined a request from some of the media to attend
19 remotely.

20 All right. So let me ask. I've been told that you
21 would rather stay with the May 1st schedule even though we
22 could now start again on the 29th, but I understand the
23 reasons for that. Everybody good with that?

24 MR. BRENNER: Yes, Your Honor.

25 THE COURT: Not inviting more than the five days we

1 had allotted for this, I will have six days if it takes that
2 long because I have several sentencing hearings and a couple
3 of other things on that following Thursday. But we could go
4 Wednesday to Wednesday if we had to, but I'm not insisting
5 that we do so.

6 MS. HUBBARD: Your Honor, Heidi Hubbard for Novant
7 Health.

8 I think using other proceedings of this type as
9 benchmarking, they typically go five to six days. We are in
10 regular communication with the Federal Trade Commission and we
11 want to commit to the Court to give regular updates on how
12 we're doing on timing as the hearing gets going. But we think
13 five to six days is a reasonable estimate to get in the
14 evidence.

15 THE COURT: And since it's a bench trial, I mean, if
16 we have to start early and stay late, we can do that. So if
17 it looks like we're getting behind even after the first day,
18 let me know and we'll change the hours.

19 Is there a practical drop dead date by which you
20 need an order from this Court with respect to the
21 administrative process?

22 MS. HUBBARD: Your Honor, I'm going to address that
23 from Novant's perspective. Again, Heidi Hubbard.

24 Obviously, the merger is terribly important to
25 Novant and CHS and we cannot close until we have a -- you

1 know, the Court -- if the Court denies the preliminary
2 injunction, which will be our request, then we would be able
3 to close. And until we get a ruling from the Court, we are
4 not able to close. And so we are prepared to go as quickly as
5 we can, including getting findings of facts and conclusions of
6 law in post-hearing as quickly as we can and whatever we need
7 to do to facilitate going as quickly as we can.

8 THE COURT: I meant it from an even more practical
9 stand than that. The administrative hearing is scheduled to
10 start the end of June, right?

11 MR. BRENNER: Yes, Your Honor.

12 THE COURT: I wouldn't anticipate having any trouble
13 getting an order out well before then, but what is the effect
14 if the Court didn't issue an order and the administrative
15 hearing started?

16 MR. BRENNER: The effect would be that the
17 administrative hearing would just begin and would continue
18 whether there's an order from this Court or not. The Court's
19 order would simply preliminarily enjoin the transaction so
20 that the administrative process could complete. But there's
21 nothing stopping the administrative hearing from beginning.
22 There is nothing tying the administrative process from
23 beginning to your order.

24 THE COURT: Okay.

25 MS. HUBBARD: Your Honor, if I could, please. Heidi

1 Hubbard again.

2 I don't know that that's ever happened. I mean,
3 typically if the parties are waiting on the ruling on the
4 preliminary injunction, they will jointly agree to put off the
5 start time of the administrative trial. So we would be a
6 little bit in uncharted territory at that point.

7 THE COURT: Well, the only thing that could
8 conceivably slow the Court down is the post-hearing proposed
9 findings and conclusions because the court reporter, I spoke
10 to her last week about this. She is frankly loaded up so if
11 she's got to turn a transcript around from this hearing, and
12 then I guess we'd have to put a really short deadline on the
13 proposed findings, and then I would have to actually think
14 about it and then draft something. So that schedule is going
15 to be a little tight.

16 MS. HUBBARD: Understood, Your Honor. And I think
17 in the case management order that Your Honor so ordered, it
18 provides that proposed findings and conclusions will be not
19 earlier than ten days after the conclusion of the hearing.
20 But we are basically telling our team, let's be ready to give
21 the Court our proposed findings and conclusions ten days after
22 the conclusion of the hearing.

23 THE COURT: And last time I talked to our court
24 reporter about this -- and I understand that there's been a
25 request for daily transcripts.

1 MR. BRENNER: Yes, Your Honor.

2 THE COURT: Which unless something has changed,
3 she's able to do during the part of the hearing that's next
4 week because she has support and backup enough to do it, but
5 not the following week.

6 Is that still the case?

7 THE COURT REPORTER: Debbie is -- I talked to Tammy.
8 Debbie is going to jump on board the second week. So we now
9 have two reporters each day.

10 THE COURT: All right. Good.

11 So let's get into some of the motions. And I'll
12 just take them, I think, in the order they were filed.

13 The FTC's motion to exclude the Deloitte
14 made-for-litigation report, which is document 113. If I'm
15 reading the motion and the response correctly, Novant asserts
16 that it will not refer or rely on that study, that report, but
17 the FTC is noncommittal.

18 MR. STEBINGER: Thank you, Your Honor. Nicolas --

19 THE COURT: And just so you know, the practice in
20 this Court is that you stand up when you address the Court and
21 oddly enough you remain seated while you're examining
22 witnesses. That's in deference to the state court because
23 that's how they do things.

24 MR. STEBINGER: I'm sorry, Your Honor.

25 THE COURT: No, that's all right.

1 MR. STEBINGER: We got a preview from prior counsel
2 and thought we were doing it the proper way, so I apologize,
3 Your Honor.

4 So I think it seems that reading the response from
5 the defendants, we're in agreement that the Deloitte efficacy
6 piece shouldn't be in evidence. The hang-up comes where we --
7 they have relied on it in their briefing and in their expert
8 reports. And so we, I think, took a fairly straightforward
9 position that we intended to point out to Your Honor where in
10 the briefing they are relying on now excluded evidence, and
11 that was something the defendants actually objected to.

12 Also, as far as we're aware, this evidence of --
13 this delayed advocacy, which is the sole basis for \$2 million
14 in claims -- I'll try to be a little more circumspect just to
15 make sure that I'm not saying anything confidential on the
16 record.

17 There are efficiencies claimed in the brief that
18 rest solely and exclusively on expert reports that incorporate
19 this Deloitte advocacy. We're not aware of any other real
20 efficiencies analysis that has happened. And so our concern
21 is that some of their witnesses or experts are going to
22 testify, well, we've done this analysis -- or we believe there
23 are efficiencies of this amount. And then we probe on cross
24 and they say, oh, this was actually relying on Deloitte's
25 work. And then we would say, Your Honor, that's something

1 that's not in evidence. We'd move to have that excluded.
2 Bringing the fact of the Deloitte advocacy basis for some of
3 these things out on cross was also something that raised
4 concerns for defendants.

5 So I think our position -- we don't plan to make a
6 feature of it. But to the extent that it does turn up that
7 it's being relied on somewhere, that's certainly something we
8 intend to bring to Your Honor's attention. I think that's the
9 disconnect. So I think I would simply request that Your Honor
10 enter the order that we've proposed and I believe it more or
11 less will resolve this issue.

12 But if defendants think that I am somehow
13 mischaracterizing the back and forth, I'm sure they will let
14 you know.

15 THE COURT: Ms. Hubbard.

16 Sorry, Ms. Stewart.

17 MS. STEWART: Thank you, Your Honor. This is Beth
18 Stewart, and I'll be happy to address that.

19 So I think we've been as clear as we can be. We do
20 not intend to admit it. We do not intend to rely upon it.
21 And we do not intend to refer upon it. And that includes any
22 experts that we would call.

23 At the time the Deloitte study was done, it was not
24 a made-for-litigation study. It was made to try to avoid
25 litigation, and we are here nonetheless. And so, Your Honor,

1 at this point our focus is not going to be on efficiencies as
2 reflected in that Deloitte study, but on why there are
3 pro-competitive benefits to this transaction that make it
4 appropriate to go through.

5 And so I'm not sure there's a disconnect, but we
6 can't say it any more clearly. We're not going to admit it.
7 We're not going to rely on it. We're not going to refer to
8 it.

9 Now, obviously, to the extent witnesses have some
10 independent knowledge of efficiencies independent of the
11 Deloitte study, they may offer testimony about that or they
12 may not offer testimony about that, and I don't think the FTC
13 has any objection to that. The disconnect seems to be that
14 they wanted to reserve the right, I think, to sort of jump up
15 and down and say, Your Honor, this report has been excluded.
16 Whereas, from the defendants' perspective, we're just trying
17 to streamline the trial. And from our focus, the focus is on
18 the anti -- the pro-competitive effects of this transaction.
19 And as a result, we do not intend to admit, rely, or refer to
20 the Deloitte report.

21 THE COURT: And you represent that none of your
22 expert witnesses will refer to it in support of their
23 opinions.

24 MS. STEWART: That's correct, Your Honor. There was
25 some reference in their reports in response to the FTC's

1 experts who were themselves the ones who introduced reference
2 to that. But again, we do not intend to rely on it. I mean,
3 I suppose it's possible that if the FTC put a hot lamp on our
4 experts, they might admit at some point there was such a
5 thing, but they don't intend to rely on it for the basis of
6 their opinions.

7 THE COURT: Well, it sounds like that's going to
8 kind of resolve itself if things go as you project and then
9 they won't have any reason to bring it up and it won't be an
10 issue.

11 MS. STEWART: That's right. The deal I offered was
12 let's just both pretend it doesn't exist, and that didn't seem
13 to quite satisfy their concern. But I think as a practical
14 matter, my hope for the Court is that today will be the last
15 time it will hear the phrase Deloitte.

16 THE COURT: All right. The next one is a motion in
17 limine regarding admissibility of documents and testimony by
18 the FTC, document 115. If I understand, you're suggesting you
19 want to do just some massive dump into the record and then
20 we'll figure out what we're actually going to use after that?

21 MR. STEBINGER: No, Your Honor, that's not the case.
22 And actually, I would like to correct some of the statements
23 in defendants' papers because they mischaracterize the relief
24 we're seeking.

25 They said that we're trying to move in the entirety

1 of our exhibit list, and that is not the case. We specified
2 categories of documents that we would like to admit. So it's
3 not the 700 on our list. It is ordinary-course documents of
4 defendants and third parties. It is deposition transcripts
5 from this case and investigational hearing transcripts from
6 our investigation. That is roughly 500 documents altogether.
7 A number of these will be addressed at the hearing, but a
8 number of them we anticipate will be referred to in the briefs
9 and the findings of facts. Just for context, the defendants
10 have included 290 exhibits on their list. And so I think that
11 this is directionally kind of consistent given that we have
12 the burden of proof.

13 The reason that we believe that these documents
14 should come in is consistent with the *G.G.* case that I'm sure
15 Your Honor has seen in the briefing. The Fourth Circuit
16 essentially -- within the Fourth Circuit, courts can and do
17 consider hearsay where to do so is consistent with the nature
18 and the purpose of the proceeding.

19 Here, the nature and the purpose of the proceeding
20 is to understand the FTC's likelihood of success in the
21 underlying administrative proceeding. These categories of
22 documents that we've culled out are, as a matter of course,
23 admissible in the underlying administrative proceeding.

24 For example, in the *Illumina* case, which was an
25 administrative proceeding that happened in 2021, the documents

1 of this nature were jointly moved in by the parties in advance
2 of the administrative hearing, about 4,000 of them, and --
3 just moved into evidence, much like in the *Wilhelm Wilhelmsen*
4 case that we cited in our papers.

5 We think that it is -- for the Court to -- frankly,
6 to do its job and understand what we're going to be doing in
7 the proceeding, it should have access to the materials and
8 consider the materials that are going to be relied upon in the
9 administrative proceeding.

10 I should note, the documents that we are citing that
11 are on our exhibit list here, we're not talking about the
12 whole evidence of -- or the whole universe of evidence that
13 will be at issue in the administrative proceeding. There are
14 going to be additional documents, additional witnesses. There
15 are additional depositions that are in the process of being
16 scheduled for that proceeding.

17 I think that in their response, the defendants don't
18 really address that a number of the cases we cited in our
19 papers where district courts were dealing with exactly this
20 issue admitted the deposition transcripts, hearing
21 transcripts, and ordinary-course documents of defendants and
22 third parties precisely for this reason, that this is what is
23 necessary to judge the FTC's likelihood of success. And I'm
24 referring to the *Thomas Jefferson* case, the *Wilhelm Wilhelmsen*
25 case, the *Microsoft* case, the *Sysco* case, and the *ProMedica*

1 case.

2 I'd also like to address the defendants' suggestion
3 that we've somehow mischaracterized the holding of the *Thomas*
4 *Jefferson* judge. In exhibits to our motion, we attached an
5 order from that judge admitting two sets of documents, docket
6 entry 274 and 275. In their papers the defendants went back
7 into the docket, pulled docket entry 274, which -- in which
8 the judge admitted 57 documents at the FTC's request and said,
9 look, this is only 57 documents. They neglected to also go to
10 document -- docket entry 275 in which another 150 documents
11 were admitted by defendants of exactly the sorts of documents
12 we're talking about here. And so that is the investigational
13 hearing transcripts, deposition transcripts, and the
14 ordinary-course documents of the parties and third parties.

15 So I think that what we're asking Your Honor to do
16 is consistent with the past practice in this variety of case.

17 Now, I think the defendants also spent a lot of time
18 on the *AT&T* case in their papers in talking about why, given
19 the importance of this case, the Court should apply a stricter
20 evidentiary standard than other courts considering preliminary
21 injunction requests under Section 13(b) of the FTC Act.

22 I think *AT&T* actually really supports what the FTC
23 is asking for here and highlights why the Court here should
24 take a different approach. And if you take a look at the *AT&T*
25 case, that was, first of all, a permanent injunction case. So

1 that was the merits proceeding, not a preliminary injunction
2 case, brought by the Department of Justice and a six-week
3 trial with tons of document custodians. As I'm sure Your
4 Honor just did with this recent tax fraud trial, it involves
5 sitting down with a bunch of witnesses just going through and
6 authenticating documents.

7 That -- although in the FTC's administrative
8 proceedings, the rules of evidence are relaxed and it's much
9 easier to move things in, the volume of exhibits for those
10 merits proceedings is a little more similar to what you're
11 looking at in *AT&T*. So, for example, in the *Illumina* case
12 about 4,000 exhibits come in at the outset of the hearing and
13 there is a month and change -- or a month or so of testimony.

14 But that's not what we are here for in this case.
15 This -- in the 13(b) statutory context, the -- I think the
16 case law in this circuit and the others that we cite in our
17 papers make clear that it's the Court's role to judge whether
18 we have a fair and tenable chance of succeeding in that longer
19 proceeding.

20 And so, Your Honor, sometimes -- we're not asking
21 for this here, but there are courts that have decided these
22 preliminary injunction cases on the papers. We have a lot of
23 good evidence in our case and we are happy to show it to you.
24 But this is not meant to be six weeks of authenticating
25 documents through records custodians. And if we were to take

1 that approach in this case of really needing to sit down and
2 authenticate each document, we would need those four to six
3 weeks to go back and get all of defendants' employees who
4 wrote these emails, sit them down. Did you write this, sir?
5 Did you write this? This is not what 13(b), what this
6 statutory framework is designed to do and that's not what
7 courts should do with it.

8 What the defendants are trying to do here with this
9 request is essentially turn this -- ignore that we're in the
10 13(b) proceeding altogether and make this the ultimate final
11 trial, and it simply isn't.

12 And I think the last thing I'll say on this point, I
13 think that the defendants have characterized a lot of their
14 argument as we want the reliable evidence to come in. This is
15 what this is about, is making sure that it's only reliable
16 evidence.

17 First of all, Your Honor has, I'm sure, decided
18 many -- is certainly capable of looking at deposition
19 transcripts and looking at evidence in the context of motions
20 and other proceedings and giving it the weight that it's
21 worth. But if you take a look at their exhibit list, which
22 I'm sure is going to be filed at some point, you can see that
23 this is not really about making sure that it's only reliable
24 evidence that comes in. This is about trying to simply keep
25 out as much evidence that is unfavorable to them. And the

1 reason I say this is if you look at -- so they have taken the
2 position that the evidence should come in through witnesses
3 who are going to be able to authenticate the stuff and talk
4 about it. Well, they have included as DX8 through 12, for
5 example -- these are just examples -- letters of support from
6 people out in -- I hesitate to say community members because
7 we don't know exactly who -- their name is on them. But in
8 any event, letters of support that have been mailed to one
9 place or another from nobody on the witness list.

10 They have included as DX205 a series of deposition
11 transcripts that are, first of all, not from anyone listed as
12 a witness in this case, but not even from this case. They're
13 from a DOJ investigation from six to eight years ago in an
14 unrelated case. And so these are not -- these are not
15 documents that in any world would ever be presented, you know,
16 as they would couch it, reliably through a testifying witness.

17 So what we view this motion as is simply an effort
18 to try to restrict the, frankly, unfavorable evidence to the
19 defendants that we have accumulated over the course of the
20 investigation, over the course of discovery in this case.

21 So what we're asking Your Honor to do is allow us to
22 move, again, not our entire exhibit list, but these categories
23 of evidence that are going to be considered as a matter of
24 course by the administrative law judge so that Your Honor has
25 the necessary material to make these decisions. And also so

1 that we don't turn this -- Your Honor has talked about needing
2 to move expeditiously through this proceeding to get it done
3 in the five or six days that we have. To do that we can't be
4 sitting there going through these many, many relevant
5 documents of the defendants. We intend to present our case
6 asking the witnesses about the relevant facts. Where there's
7 documents that we're going to ask them about, we're going to
8 ask them about those documents. But some of these documents
9 don't speak -- or some of these documents speak for themselves
10 and we don't need to spend all that time standing up there
11 with the witnesses, you know, just reading things off of
12 paper.

13 And so we ask the opportunity to move these in ahead
14 of the hearing and proceed expeditiously. Highlight the most
15 relevant evidence for Your Honor.

16 Thank you.

17 THE COURT: So is the dispute from the defendants
18 not that the documents are not authentic, that is, they are
19 ordinary-course records or they are actual transcripts, but
20 that you want each of them sponsored by -- I'm not sure how
21 that's different from authenticated by -- a witness.

22 MS. HUBBARD: It's not limited to sponsoring, Your
23 Honor.

24 So for example, there are documents on the FTC's
25 exhibit list that have triple hearsay in them: A news article

1 quoting two, three other people. That, under any stretch of
2 the imagination, would normally go through a pretty hard look
3 under the Federal Rules of Evidence.

4 And we are asking for a presumption in the first
5 instance that exhibits come in one at a time so that they can
6 be: Is there a proper foundation for them? Are they
7 relevant? Is there hearsay? Is there some other problem with
8 them?

9 As I think Your Honor can tell from our brief, while
10 the standard in a preliminary injunction hearing may be
11 relaxed, it is not abandoned. And in fact, in the cases that
12 the FTC has cited in their brief, a lot of times either the
13 parties agreed on what was going to come in or the Court was
14 saying at the preliminary injunction stage, different from our
15 situation, there's going to be a trial in federal court under
16 the Federal Rules of Evidence that is going to test these
17 exhibits so we can relax it a little bit, not abandon it.

18 And we're saying at this stage, we haven't even
19 started. There is no way that it is possible to tell which of
20 those 500 and something documents are reliable, which of them
21 have got triple hearsay in them, which of them are completely
22 out of context, which might be drafts. There are some of
23 them, including as we gave an example in our brief, where it
24 turned out that the quote out of context wasn't even from one
25 of the parties. It was from some third party and it was

1 entirely unclear. And I won't say it because it's -- I think
2 there's a confidentiality assertion over it by the third
3 party. And we need to talk about the additional complication
4 of confidentiality. If 500 documents just sail into the
5 record, many of them are subject to confidentiality claims.

6 But the context, so how does one tell if the FTC
7 plans to cite a lot of these things in their post-trial
8 findings of fact and conclusions of law that the Court has
9 never seen in our hearing? How does one tell who is saying
10 that? Why are they saying that? Is it a draft? Is it a
11 final? Was it ever acted upon? What is the context? Is
12 there an explanation? None of that will be apparent.

13 And I think the reason that we cited the *AT&T*
14 comments by Judge Leon so heavily is -- yeah, it was not a
15 preliminary injunction hearing, but he was identifying the
16 very real problem that exists here, too, was some kind of mass
17 admission. I mean, Judge Leon said especially when the time
18 frame is compressed for decision, it is not helpful to have
19 some kind of blanket admission because the Court doesn't have
20 the luxury of spending months sorting through these various
21 things that are being cited to figure out what is reliable,
22 what is meaningful.

23 I think if we take a step back, FTC has not even
24 pretended that they plan to use 500 or so of these documents
25 at the hearing. It sounds like the plan is to have a whole

1 bunch of things sail into evidence that were never mentioned,
2 no context, can't even tell who wrote them or why or when or
3 what, and then argue from them.

4 And I think it's critical that the standard that
5 they cited for the preliminary injunction is not right. That
6 this is a federal court with a federal standard for
7 preliminary injunction, substantial likelihood of success, and
8 sort of say it doesn't matter and just let it all sail in.
9 Let's abandon the rules of evidence even though we're in
10 federal court. It's not helpful.

11 And we have on top of that the added complication of
12 the confidentiality issues. And I think the Court has been --
13 the docket and the wonderful clerks have been bombarded with
14 assertions of confidentiality by third parties well taken. If
15 all these documents sail into the record, there's all kinds of
16 issues about what is confidential, what stays confidential,
17 and we're going to have those types of issues in the hearing.
18 We're going to need to work closely to be thoughtful about
19 issues where someone is asking to close the courtroom. But it
20 is not helpful to then have this raft of documents untied to
21 any witness and really, you know, no foundation for their
22 reliability for whether they would even get close to passing
23 muster under the Federal Rules of Evidence.

24 So our proposal, which I feel like is a modest
25 proposal at this moment when we're a week out, is let's start

1 with a presumption that the parties are going to try to abide
2 by the rules that we should be abiding by. And we did offer a
3 number of ways to try to streamline if there are some small
4 subset of additional documents that the parties can agree on
5 or, as in the *Thomas Jefferson* case, that post-trial,
6 post-hearing the parties have a limited number that they can
7 agree on. Or if we can't, that we can at least formulate
8 meaningful objections for the Court to consider. That I think
9 is a way to proceed that helps us be as helpful as we can with
10 the evidence we're presenting to the Court in a hearing that
11 makes all the difference in terms of whether we are going to
12 be able to acquire these two hospitals.

13 THE COURT: All right. So the Court accepts the
14 proposition that hearsay documents can be considered during
15 this hearing and so that's not a problem for the Court. And
16 the same with transcripts for which there was no cross
17 examination. The Court knows how to weigh such evidence, the
18 fact that it is hearsay or triple hearsay, perhaps, and the
19 fact that a transcript may not have included any cross
20 examination. So I don't have any conceptual conflict with
21 those coming in.

22 But what the Court doesn't want is a bunch of
23 exhibits in the record that nobody is going to use, ever.
24 Because I can tell you this. If a document is not discussed
25 during the hearing or referenced and discussed in post-hearing

1 pleadings, it's not going to be considered. I'm not going
2 through the record to see if you all missed something and see
3 if I can find something I like.

4 So I think the way I want to do this is that the
5 exhibits will be entered at the time the witness is
6 testifying.

7 And I do not expect any arguments over authenticity,
8 right? It's just you would say that they are inadmissible
9 under the rules of evidence, which we're not going to strictly
10 follow.

11 But that those documents come in during the hearing
12 with whatever witness is going to be discussing them. And at
13 the end of the hearing, we will have a discussion about what
14 else do the parties want to move in. By that time, at the end
15 of the hearing, everybody should have a pretty good idea of
16 what they're going to want to address in their post-hearing
17 briefings rather than just let's dump it all in now and figure
18 out later what we're actually going to use.

19 MS. HUBBARD: Thank you, Your Honor. That makes
20 sense.

21 MR. STEBINGER: Thank you.

22 THE COURT: All right. So the next one is motion to
23 exclude expert testimony by Dr. Jha, a motion by the FTC at
24 docket 116 and the mirror image motion by defendants to
25 exclude portions of Dr. Tenn's testimony.

1 I have read -- haven't read everything in this case,
2 but I will be as prepared as I wanted to be since we get this
3 break. I was worried about not being as prepared as I wanted
4 to be, but now I will be. But I have read those. They're
5 both going to be denied. I have heard from both sides why I
6 should or should not give much weight to those expert opinions
7 and why. Okay. I'm aware. So the motion to exclude is
8 denied.

9 Unopposed motion to allow remote testimony of Burns,
10 docket number 158. Other than the logistics, I certainly have
11 no issue with that. We'll just figure out how to do it.

12 MR. BRENNER: Thank you, Your Honor.

13 THE COURT: All right. Now the one that's kind of
14 got me a bit wondering, the motions to consider evidence in
15 camera.

16 Do the parties have a sense as to how many of
17 these -- first of all, it's not clear to me from the motions
18 from the third parties to consider there's -- you know, they
19 say it's trade secret and yada yada yada. Well, I don't know
20 that. They have quoted the right language. Whether it's
21 actually applicable I do not know.

22 I suspect there's going to be some media interest in
23 this and I'm not going to spend a bunch of time ruling on
24 motions from the press to unseal certain things, so I want to
25 limit this to the extent we can.

1 It's a long way of asking how -- do you know, either
2 side, how many of these request for in camera review of
3 documents will actually be used during this hearing?

4 MR. BRENNER: Your Honor, I think defendants may
5 have more information about this because none of this
6 information is the FTC's and some of it is defendants'. I do
7 suspect -- I can tell you from other antitrust cases that I've
8 been involved in that nonparties are often quite protective of
9 their documents and testimony because there are potential
10 competitors, you know, listening in. And they're protective
11 of business -- forward-looking business strategies, pricing
12 information, things of that nature. And we are happy to work
13 with the Court's preference on how to handle this.

14 I can tell you that the way I've seen it work in
15 past practice is that there is an open court session of direct
16 and cross examination. I'm sorry, an open court session of
17 direct and then an open court session of cross examination.
18 Then we go into a sealed session where there would be the
19 continuation of the examination with the public not in the
20 courtroom. And we could do that in limited fashion when the
21 examinations involve or implicate the confidential information
22 either involving defendants' material or nonparty material.
23 That's one mechanism that I've seen work.

24 And to Your Honor's question about media interest,
25 what I've seen in past cases is that after the hearing

1 transcripts are finalized by the court reporter, the parties
2 and nonparties can go through them and unredact certain
3 information and testimony that occurred in sealed session so
4 that the transcripts could be more publicly available, or we
5 could maximize public availability.

6 THE COURT: So the original question: How many of
7 these supposed confidential documents will actually be used?

8 MS. STEWART: Your Honor, Beth Stewart for
9 defendants.

10 I think the good news is this is a shared problem
11 between we and the FTC and we've had some really productive
12 discussions so far about how to make this work.

13 I think the Court should generally assume that
14 essentially every third-party witness is seeking to have any
15 exhibit that they produced protected as confidential. That's
16 what we're seeing on the docket that you're seeing as well,
17 that there have been just maybe dozens of filings in the last
18 week seeking to protect that.

19 From the perspective of CHS and Novant -- and
20 obviously, Mr. Perry will address it if he has anything to
21 modify it. We obviously want to have an open trial as much as
22 we possibly can. There may be very narrow segments of
23 defendants' information that we would think would need to be
24 confidential. But we are operating on the assumption that in
25 order to have this trial done efficiently in six days, that we

1 need to be as thoughtful and as targeted as we can in terms of
2 those requests.

3 Another mechanism that we've agreed to with the FTC
4 that I think could be potentially helpful is that at least as
5 to direct examinations, we have an agreement that we will
6 exchange those exhibits at 5:00 the day before.

7 And so right now there are a thousand something
8 exhibits on the parties' collective lists. But our hope is
9 that once we have more targeted exchanges as part of that
10 process, we can really focus in on what, if anything, actually
11 needs to be protected. And I think, frankly, we probably need
12 to have some more discussions amongst us now that we have seen
13 the deluge on the docket of the third parties.

14 But as I say, I think this is in some significant
15 measure a concern of third parties and not of the parties to
16 this case. Again, maybe very narrow things that we as
17 defendants would find proprietary. But it is a hot mess, as I
18 say in Georgia.

19 THE COURT: Yeah, the -- but again, of the six days
20 worth of hearing, how much of it would be taken up discussing
21 what is claimed to be confidential information?

22 MS. STEWART: So one way to look at it is there are
23 roughly 32 witnesses on the parties' collective witness list
24 and about half of those are third parties. And again, my
25 understanding is that essentially all of those third parties

1 are, at this stage at least, preserving their right to request
2 of the Court that their confidential information be sealed. I
3 think they will be asking the Court that certainly any
4 exhibits that they've produced receive confidential treatment
5 and will perhaps also be asking the Court that testimony by
6 their witnesses be sealed.

7 As to the remaining half in terms of kind of the
8 party and expert witnesses, again, my expectation is that the
9 bulk of those examinations can happen in open court and there
10 may be very narrow slivers that we would have to close the
11 court for consistent with Mr. Brenner's explanation.

12 THE COURT: Well, it may be, because I've seen it
13 before, that there is an overclaim of confidentiality. And of
14 course, I won't know that until I see it or hear it. So it
15 may be we'll have to act as if they are. And I might be able
16 to make some decisions in the moment that that's not a sealed
17 part of the transcript, that's not a sealed document, that's
18 not a sealed exhibit.

19 So the logistics of it, would we be able -- instead
20 of just running people in and out every time we want to get a
21 new witness, is there a way to do it, like put that part of it
22 at the beginning of the day, the end of the day, set aside a
23 day -- does that make any sense -- on presenting the evidence?
24 I know it might not, but...

25 MS. STEWART: I think it's a helpful idea, Your

1 Honor. As I say, I think, candidly, we've learned a lot on
2 each side watching the docket expand over the last week.

3 And for what it's worth, another helpful fact is I
4 think that between the two of us, we're each in contact with
5 counsel for all of these parties. And so why don't we commit
6 to sort of take this back and try to think of a way to make
7 this work. Again, I think it is a largely third-party
8 concern.

9 THE COURT: Yeah, see if you can figure out a way so
10 that we're not kicking people in and out of the courtroom and
11 inviting them back in every 30 or 40 minutes.

12 MR. BRENNER: Your Honor, one thing that might work
13 is depending on how you break up the court day, we could start
14 after a break with sealed sessions and then reopen, or
15 something like that. I think that would be easier given
16 travel schedules for some of these witnesses than just set
17 aside a whole day for a sealed session. But I do think
18 arranging sealed sessions around breaks so that we were not
19 ushering spectators in and out.

20 THE COURT: Well, do try to work on it together with
21 the goal of not shuffling people around during court time.

22 MR. BRENNER: Yes, Your Honor.

23 MS. STEWART: Yes, Your Honor.

24 MR. BRENNER: Be happy to.

25 THE COURT: And we can talk about that again on the

1 1st, I suppose.

2 The question was raised, I think in an email to
3 Mr. Brenner, Irving Brenner, whether the Court is amenable to
4 a procedure agreed upon by the parties to call witnesses
5 appearing on both sides' witness list just one time. I am
6 very much in favor of that.

7 MR. BRENNER: Thank you, Your Honor.

8 MS. STEWART: Your Honor, if I can just clarify one
9 thing so we have full agreement. Again, this is another issue
10 we've discussed at length with the FTC and I think we are in
11 full agreement.

12 Because some of our party witnesses, meaning
13 employees of Novant or potentially employees or former
14 employees of CHS will now get called in the FTC's case and
15 they will testify only once, needless to say, when we get up
16 and do our direct examinations of our own witnesses, we will
17 be exceeding the scope of what the FTC just questioned them
18 on. I don't think there's any disagreement about that, but I
19 just wanted to make sure that we submit to that for the
20 record.

21 THE COURT: That's the necessary result of such an
22 agreement.

23 MS. STEWART: Thank you, Your Honor.

24 MR. BRENNER: Yes, Your Honor.

25 THE COURT: Other than live testimony and obviously

1 documents, is there any other evidence that you're intending
2 to put in during the hearing?

3 MS. STEWART: So on behalf of defendants, Your
4 Honor, yes. There are two witnesses who we intend to call by
5 video. The Court will be relieved to hear their testimony
6 will be brief, I think. We are in the process of working with
7 the FTC to come up with a set of designations,
8 counter-designations, et cetera.

9 I think our intention on behalf of defendants, in
10 the spirit that the Court probably doesn't need a movie night
11 at the end of the day, is to actually play the video live and
12 we can do sort of live objections as the transcript goes. But
13 as I say, I think there will only be two such witnesses, at
14 least from our side, and I'm not aware of any from the FTC
15 side.

16 MR. BRENNER: Your Honor, there are no additional
17 deposition designations from the FTC.

18 The other category of evidence that we have
19 discussed with counsel for defendants is a stipulation, a set
20 of facts stipulated relating to one witness's testimony who
21 was -- or is on our witness list, but we think it would be
22 most efficient for the Court if we just worked together
23 cooperatively with the defendants and put together a set of
24 stipulated facts that obviated the need for her to be called
25 as a witness.

1 THE COURT: All right. That all sounds good. But
2 are you going to put in deposition or investigate interview
3 transcripts during the hearing?

4 MR. BRENNER: We would potentially use those for
5 impeachment purposes. I don't believe we would intend to
6 introduce any of them as exhibits, but we would -- as
7 previously discussed with my co-counsel, we would plan to cite
8 them and reference them in our proposed findings of fact after
9 the hearing.

10 MS. HUBBARD: And Your Honor, we do not plan to use
11 and try to introduce those. Again, for impeachment or to
12 refresh, but that's different.

13 THE COURT: So if that's the way it goes, please,
14 when you do your designations, keep them to the truly key
15 portions of the, you know, designation of this hundred out of
16 a hundred and fifty pages we really want the Court to read.
17 Because if you want me to make a decision, give me less to
18 read.

19 MS. STEWART: And Your Honor, is the Court
20 comfortable with us playing those limited two depositions --
21 again, I don't expect they're going to be more than probably
22 an hour and change total. Would the Court be comfortable with
23 us playing them live and doing sort of objections as if it
24 were a normal witness being called?

25 THE COURT: That's fine.

1 MS. STEWART: Okay.

2 THE COURT: And do look for any efficiencies we can
3 put into this. You mentioned stipulations, which, of course,
4 I encourage. But I hope not to argue over -- we can talk
5 about this a little bit -- the authenticity of exhibits.

6 MS. HUBBARD: Your Honor, we agree with that. I
7 mean, authenticity, is it authentic, that's like a waste of
8 everyone's time to argue over that. When we're asking to
9 follow the rules of evidence, we're talking about more
10 substantive rules of evidence.

11 THE COURT: Yeah, and I've already said we're not
12 going to strictly adhere to the rules of evidence.

13 MS. HUBBARD: Understood, yes.

14 THE COURT: I will forewarn you that if I feel the
15 need to ask a witness a question, I will. And I've actually
16 been known to ask questions during bench trials during
17 openings and closings because if there's something I want to
18 know and you're not telling me, your purposes are not being
19 well served. So I will try not to be a particularly hot
20 bench, but if I get curious, I'll ask some.

21 So for that first day, how long would you like for
22 opening statements?

23 MR. BRENNER: Your Honor, for the FTC, we think 45
24 minutes to an hour would be sufficient; but we're happy to
25 comply with whatever preference you have in terms of length of

1 opening.

2 MS. HUBBARD: And Your Honor, it's Heidi Hubbard
3 again.

4 For the defense total, so both Novant and CHS, we
5 were asking in our conversations with FTC to agree on 75
6 minutes, with the idea that we would try to go less.

7 THE COURT: Well, I'll give the FTC up to an hour if
8 they would like it, but you don't have to use it.

9 MR. BRENNER: Thank you, Your Honor.

10 THE COURT: And we'll give the defendants a total of
11 75 minutes however you want to divide it.

12 MS. HUBBARD: Thank you, Your Honor.

13 THE COURT: I think the calendar entry says we're
14 going to start at 9:30. I think that is just put in because
15 we usually start jury trials on the first day at 9:30. We can
16 start at 9:00 if that is going to be helpful to everybody.

17 MS. HUBBARD: That would be great.

18 MR. BRENNER: That works for us.

19 THE COURT: And the courthouse is open, I think it's
20 7:00 AM, so you can come in any time after that. And we'll
21 just sort of adjust the schedule as we think we need. If we
22 need to start taking fewer breaks or stay longer at night,
23 then we'll adjust accordingly.

24 MS. HUBBARD: Your Honor, would you mind giving us
25 just a sense of what your typical schedule is. It helps us

1 with witness planning.

2 THE COURT: Well, of course, there's a difference
3 between a bench and a jury. A jury trial I go either 9:00 or
4 8:30 to 5:00 or 5:30. In this one I think our default
5 position, we'll go 9:00 to 5:30 or 6:00, and then start
6 getting their earlier in the morning if we need to. And then
7 obviously we'll take a lunch break. And we may need fewer
8 other breaks since we don't have a jury to worry about. But
9 those are kind of ad hoc. I don't look at the clock and say
10 hour and a half, we're quitting.

11 (The Court and the clerk conferred.)

12 THE COURT: Well, the courthouse is open at 7:00,
13 but the guards won't let you in until 8:00, I'm told.

14 THE CLERK: I just don't want them waiting outside
15 for an hour.

16 THE COURT: I guess there's a difference between
17 being open and accessible.

18 I don't know if you visited our courtrooms down
19 there, but there are -- I don't know if they'll be big enough
20 for your purposes. But outside the courtroom, my courtroom,
21 there's an attorney conference room on each side of the hall
22 so you can divvy that up as you sit fit.

23 MS. HUBBARD: And one question that my wonderful
24 trial paralegal always asks me to ask is whether we can leave
25 hard copies of exhibits either in the courtroom or in our

1 little witness room overnight.

2 THE COURT: Yes, you can, although typical
3 disclaimer: If anything happens to it, it's not on us.

4 MS. HUBBARD: Understood.

5 THE COURT: But it's a secure building. I leave my
6 stuff there.

7 MS. HUBBARD: All right. Thank you.

8 THE COURT: So it should be all right.

9 Do any of you need training on our electronic
10 evidence presentation system?

11 MR. BRENNER: We have a training scheduled for
12 Friday of this week, I believe.

13 MS. HUBBARD: And we have a wonderful sort of tech
14 hot seat person who I think has been in communication with the
15 court. The court staff has been wonderful in helping answer
16 those questions. So we're going to try to be ready to roll
17 and know what we're doing on the morning of May 1st as far as
18 tech goes.

19 THE COURT: Anything else you want to address
20 tonight?

21 MR. CROMWELL: Your Honor, I try and make sure I
22 understand what the Court is ordering. I wanted to make sure
23 I understood how long the lunch break was going to be.

24 THE COURT: Depends on how hungry I am.

25 MR. CROMWELL: Fair. Fair. But just for planning

1 purposes.

2 THE COURT: I mean, it's usually an hour. If
3 there's some reason, like good reason, to make it longer, but
4 it seems to me like lunch can usually be eaten in an hour.

5 MR. CROMWELL: And then we did talk about finishing
6 within six days. I understand the Court has some hearings on
7 the seventh day. If we go long, are we available to come back
8 that Friday and close or are we stuck with the first three
9 days?

10 THE COURT: I think we just have one brief thing
11 that Friday, right?

12 THE CLERK: Correct.

13 THE COURT: Just have the Gardasil thing.

14 THE CLERK: Correct.

15 THE COURT: So yeah, we would have most of the day
16 on Friday if we had to.

17 MR. CROMWELL: If we had to. Okay. Great. Thank
18 you.

19 THE COURT: I mean, like nearly all of it. I think
20 I have a 30- or 60-minute hearing on that Friday.

21 MR. BRENNER: Your Honor, related to that, would you
22 envision having closing arguments immediately following the
23 evidentiary hearing or would you want to schedule those after
24 the proposed findings of fact are submitted?

25 THE COURT: I'd just as soon do it immediately

1 after.

2 MR. BRENNER: Thank you, Your Honor.

3 THE COURT: If there is some good reason why you
4 don't want to do that...

5 MS. HUBBARD: For the defense we would like to do
6 that.

7 THE COURT: All right. That will be the plan, then.

8 MR. BRENNER: Thank you, Your Honor.

9 THE COURT: Anything else we can talk about?

10 (No response.)

11 THE COURT: Again, I appreciate everybody coming up
12 here. I wouldn't have done this to you if I had known what
13 was going to happen today. We could have done this at a more
14 convenient hour for all of us, but you can blame those
15 attorneys that left earlier.

16 MS. HUBBARD: We will, but we are grateful to the
17 Court and the courtroom staff for seeing us at this hour. So
18 thank you.

19 THE COURT: All right. Thank you. Well, I'll see
20 you all on the 1st, then.

21 ALL COUNSEL: Thank you, Your Honor.

22 (End of proceedings at 5:57 PM.)

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1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NORTH CAROLINA
3 CERTIFICATE OF REPORTER
4
5

6 I, Cheryl A. Nuccio, Federal Official Realtime Court
7 Reporter, in and for the United States District Court for the
8 Western District of North Carolina, do hereby certify that
9 pursuant to Section 753, Title 28, United States Code, that
10 the foregoing is a true and correct transcript of the
11 stenographically reported proceedings held in the
12 above-entitled matter and that the transcript page format is
13 in conformance with the regulations of the Judicial Conference
14 of the United States.

15
16 Dated this 25th day of April 2024.
17
18

19 s/Cheryl A. Nuccio

20 Cheryl A. Nuccio, RMR-CRR
21 Official Court Reporter
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25